SELECTED CASES ON CONTRACTS

PIERSON AND CALLENDER

(FIFTH EDITION)

SELECTED CASES ON CONTRACTS

ARRANGED FOR

The use of Students of Business Law

—BY—

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PREFACE

FIFTH EDITION

THIS CASE BOOK has been prepared for the special use of students taking a course in Business Law in Universities and Colleges. It is not intended for lawyers nor for students in law schools. Its immediate purpose is to supply a set of convenient working models for those about to enter business. The study of a text book on Business Law is often nothing more than a memory exercise. The study of the cases submitted herewith should, by providing concrete instances in the form of decided cases, give an increased facility in meeting the everyday legal problems that so often confront the business man.

In many of the cases we have abridged the statement of facts. This has been done without calling attention to the matter. Portions of opinons on points irrelevant to the subject illustrated are omitted. These omissions are indicated. Wherever, in the course of the opinion of the Court, a group of authorities are cited, these citations are abridged. The case books on Contracts prepared by Keener, and by Huffcut and Woodruff, have been of much assistance to us, and acknowledgment is made therefor.

Through the courtesy of the American Law Book Company, the editors are able to present, as an Appendix, a comprehensive analysis of the Law of Contracts substantially as it appears in Cyc. This analysis is reproduced subject to the copyright of the American Law Book Company.

A few of the cases in the earlier editions have been replaced by decisions that are more recent, and more clearly illustrate certain of the principles involved in Business Law. A number of footnotes have been introduced to cover new points, and a glossary has been added.

This volume is dedicated to every one who finds it useful.

WARD W. PIERSON,
CLARENCE N. CALLENDER.

October 1, 1917

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FORMATION OF CONTRACTS

Chapter I

OFFER AND ACCEPTANCE

Express and implied contracts

HERTZOG *v.* HERTZOG,

29 Pa. 465 (1857).

Appeal from judgment for plaintiff.

This suit was brought by John Hertzog to recover from the estate of his father compensation for services rendered the latter in his lifetime, and for money lent. The plaintiff was 21 years of age about the year 1825, but continued to reside with his father, and to work for him on the farm until 1842. He then left his father, who put him on another farm which the father owned. Some time afterwards the father and his wife moved into the same house with John and continued to reside there until the death of the father in 1849.

The following testimony was relied upon to prove a contract or agreement on the part of the father, George Hertzog, to pay for the services of the plaintiff. Adam Stamm affirmed, "John labored for his father; all worked together. The old man got the proceeds. I know the money from the grain went to pay for the farm—the old man said so. John's services worth $12 per month; the wife's worth $1 per week, besides attending to her own family. I heard the old man say he would pay John for the labor he had done."

Daniel Roderick, sworn: "John Hertzog requested him to see his father about paying him for his work, which he

had done and was doing, and stated, that he had frequently spoken to the old man, his father, about it, and he had still put him off; he agreed to see him, and thinks it was in June, 1849. Coming from Duncan's Furnace I spoke to the old man about paying John for his work. He said he intended to make John safe. John spoke to me in the spring, 1848; the old man died in August, 1849, I think."

The question involved in this case was whether the above testimony is sufficient to prove an agreement on the part of the father to pay for the services of the son.

LOWRIE, J.: "Express contracts are where the terms of the agreement are openly uttered and avowed at the time of the making: as, to deliver an ox or 10 loads of timber, or to pay a stated price for certain goods. Implied are such as reason and justice dictate; and which therefore the law presumes that every man undertakes to perform. As if I employ a person to do any business for me or perform any work, the law implies that I undertook and contracted to pay him as much as his labor deserves. If I take up wares of a tradesman without any agreement of price the law concludes that I contracted to pay their real value."

This is the language of Blackstone (2 Comm. 443), and it is open to some criticism. There is some looseness of thought in supposing that reason and justice ever dictate any contracts between parties, or impose such upon them. All true contracts grow out of the intentions of the parties to transactions, and are dictated only by their mutual and accordant wills. When this intention is expressed, we call the contract an *express* one. When it is not expressed, it may be inferred, implied, or presumed, from circumstances as really existing, and then the contract, thus ascertained, is called an implied one. The instances given by Blackstone are an illustration of this.

We have in law three classes of relation, called contracts.

1. Constructive contracts, which are fictions of law adapted to enforce legal duties by actions of contract, where no proper contract exists, express or implied.

2. Implied contracts, which arise under circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intention to contract.

3. Express contracts.

In the present case there is no pretense of a constructive contract, but only of a proper one, either express or implied.

The law ordinarily presumes or implies a contract whenever this is necessary to account for other relations found to have existed between the parties.

Thus if a man is found to have done work for another, and there appears no known relation between them that accounts for such service, the law presumes a contract of hiring. But if a man's house takes fire, the law does not presume or imply a contract to pay his neighbors for their services in saving his property. The common principles of human conduct mark self-interest as the motive of action in the one case, and kindness in the other; and, therefore, by common custom, compensation is mutually counted on in one case, and in the other not. If we find, as ascertained circumstances, that a stranger has been in the employment of another, we immediately infer a contract of hiring, because the principles of individuality and self-interest, common to human nature, and therefore the customs of society, require this inference.

But if we find a son in the employment of his father, we do not infer a contract of hiring, because the principle of family affection is sufficient to account for the family association, and does not demand the inference of a contract. And besides this, the position of a son in a family is always esteemed better than that of a hired servant, and it is very rare for sons remaining in their father's family, even after they arrive at age, to become mere hired servants. If they do not go to work or business on their own account, it is generally because they perceive no sufficient inducement to sever the family bond, and very often because they lack the energy and independence necessary for such a course; and

very seldom because their father desires to use them as hired servants.

We concede that in a case of this kind an express contract may be proved by indirect or circumstantial evidence. If the parties kept accounts between them these might show it, or it might be sufficient to show that money was periodically paid to the son as wages; or, if there be no creditors to object, that a settlement for wages was had, and a balance agreed upon. But there is nothing of the sort here. These witnesses (Stamm and Roderick) add nothing to the facts already recited, except that the father told them shortly before his death, that he intended to pay his son for his work. This is no making of a contract or admission of one; but rather the contrary. It admits that the son deserved some reward from his father, but not that he had a contract for any.

The difficulty in trying causes of this kind often arises from juries supposing that, because they have the decision of the cause, therefore they may decide according to general principles of honesty and fairness, without reference to the law of the case. Their verdict may, in fact, declare what is honest between the parties, and yet it may be a mere usurpation of power, and thus be an effort to correct one evil by a greater one. Citizens have a right to form connections on their own terms and to be judged accordingly. When parties claim by contract, the contract proved must be the rule by which their rights are to be decided. To judge them by any other rule is to interfere with the liberty of the citizen.

Judgment reversed and new trial awarded in accordance with this opinion.

Necessity for offer and acceptance

COLUMBUS, ETC., RAILWAY CO. *v.* GAFFNEY,

65 Ohio 104 (1901).

Appeal from judgment for plaintiff (Gaffney).

The plaintiff had a contract with the Government by which, for a compensation, he was bound to carry the mails between the post office at Lancaster, Ohio, and the depot of the Columbus, etc., Railway Co., and the depot of the Cincinnati, etc., Railway Co. at that place. These two roads at this point form a junction, the roads running on opposite sides of the common depot within 40 feet of each other. Each of these roads had a contract with the Government for carrying mails over its roads by which each was required to transfer the mails over its road to that of the other when required in the course of transit. During the entire period for which compensation was claimed the work of transferring from one road to the other was performed by the plaintiff or his assignor. The plaintiff during this time supposed that it was his duty under his contract with the Government in regard to carrying the mails between the depots and the post office to make this transfer between the two roads, and performed the service under this impression until he was informed by an agent of the Government that it was not his duty and was ordered to desist from so doing. No demand for compensation was made until he had received this order from the Government agent, and he at no time prior thereto supposed that he was entitled to any compensation; nor was there any expressed request on the part of the company or its agents that he should perform this service, the company having agents of its own at the depot who should have performed the service.

On this state of facts it is claimed that a contract should be implied on the part of the defendant to pay the plaintiff what his services were reasonably worth in so transferring the mails for the defendant at the depot.

MINSHALL, C. J.: It seems clear that no contract can be inferred from the facts in this case, for it does not appear from anything in the case that the plaintiff performed the services for which he sues under a contract with the defendant whereby it was agreed between them that he should be compensated for his services by the defendant in any sum. There could have been no meeting of the minds on any of its terms, and without it no contract can exist whether express or implied. During all this time, some six years, in which he was engaged in doing the work, the plaintiff supposed that it was his duty to do it under his contract with the Government. He did not therefore during the time regard himself as performing any services for the defendant and made no claim against it for compensation until after he had been informed that it was not his duty to do what he had been voluntarily doing. This fact negatives the existence of any contract express or implied having existed between the parties during the time the services were being performed. The minds of the parties could not have met on the subject of compensation when the party doing the work had no idea that he was to be compensated by the defendant at the time the work was done. Under such circumstances the understanding of the party for whom the work was done becomes immaterial unless it had been so communicated to the other party as to have induced the performance of the services, which was not the case, if it had any such understanding, but there is nothing in the case to show any such understanding on the part of the Company. It is true that under its (railroad) contract with the Government it appears that the transfer of mails from its road to the other was one of its obligations, and the plaintiff in attending to the matter performed a service that it through its agents should have performed, but no request of the Company is here shown by implication; since the Company had agents of its own at the depot and the plaintiff in doing what he did performed services that should have been attended to by the employees of the Company. And had any claim been made by the plaintiff

for compensation, or had the circumstances indicated that he would make such a claim, doubtless the Company would have directed its own agents to attend to the business. This shows that there was nothing in the conduct of the plaintiff that indicated a purpose on his part to make a claim for compensation at the time the work was performed, and that the Company did not regard itself as receiving services from him for which it was to make compensation. In no view of the case then can the suit of the plaintiff be maintained against the Company on the ground of an implied contract to pay what the services were reasonably worth.

Judgment reversed; judgment for defendant.

Common intention necessary

THOMAS *v.* GREENWOOD ET AL.,

69 Mich. 215 (1888).

Appeal from judgment for defendants.

In reply to a general letter of inquiry from the plaintiff the defendants wrote as follows:

"DULUTH, MINN., Feb. 11, 1886.

"MR. H. H. THOMAS,
"9 Munger Block,
"Bay City, Mich.

"Dear Sir:—We are just in receipt of yours of the 9th instant in reference to Hercules Powder. Replying, would say that we have the following in stock: 600 lbs. No. 2¼ inch; 2800 lbs. No. 2, 1¼ inch; 2600 lbs. No. 2 S. 1½ inch; 1150 lbs. No. 2 S. S. 1¼ inch; 1550 lbs. No. 1 X. X. 1¼ inch. Of this we would like to reserve about 1500 lbs. Our Mr. Munday, who was talking with you, is not at home, and is bumming around the country in the cant-hook business. We quote this powder to you at 10 cents per pound f. o. b. here, we to reserve about amount stated. We also quote 4 x caps (see enclosed circular), which we are told are the best caps made, at $5.90 per thousand. Fuse, Lake Superior Mining, single and double tape, at 20 per cent. off Toy & Bickford Company's or Aetna Powder Company's list. Terms, cash or approved notes. Should you decide to order these goods you may give us endorsed note that we can use the same as cash, dated March 1st, four months, without interest.

"Hoping to receive your order, we remain,
"Yours truly,
"G. C. GREENWOOD & CO."

Upon receipt of the above communication plaintiff wrote Greenwood & Co. as follows:

"Bay City, Mich., February 15, 1886.

"MESSRS. G. C. GREENWOOD & CO.,
"Duluth, Minn.

"Gentlemen:—Your letter or statement showing amount of Hercules Powder to hand, showing 8700 lbs. I will take 7200 lbs. of same, leaving you the 1500 lbs. in reserve, as you wished; so please ship promptly by freight.

1900 lbs. No. 2 S. 1¼ inch Hercules
2600 lbs. No. 2 S. 1½ inch Hercules
1150 lbs. No. 2 S. S. 1¼ inch Hercules
1550 lbs. No. 1 X. X. 1¼ inch Hercules
$720.00

"Please ship above goods at once, and on receipt of invoice will forward endorsed note due four months from March 1, 1886. I do not understand what grade No. 4 x is. I use Tupper force caps of same brand in my trade here. You are too high on caps and fuse.

"Respectfully,
"H. H. THOMAS."

The defendant did not ship the goods as requested, and the plaintiff brings this action to recover his damages based upon the alleged contract.

Counsel for the defendants insist that the minds of the parties never met because:

First.—The offer is indefinite and left two matters open for further consideration, namely, the grade and quantity of each grade of the 1500 pounds of powder to be reserved by Greenwood & Co.; also the sufficiency of the note to be accepted in payment of the goods.

We think the position of the counsel for defendants is correct. The right to select powder reserved is clearly implied in the reservation. It applied to one grade no more than to another, and the fact the price at which the whole quantity was offered being a uniform price of 10 cents a pound, made no difference with the exercise of this right.

They did not agree to take any endorsed note plaintiff might send. Quality was essential. It was to be such a note as they could use the same as cash. Who was to pass upon this qualification? Not the one who gave the note, but they who received it. But the plaintiff annexed a new condition.

It was this: "On receipt of invoice will forward endorsed note."

Second.—The offer is for the sale of powder and of the caps and fuse. The offer is, "Should you decide to order these goods." The acceptance is of the powder only.

We think this point is well taken. Caps and fuse cannot be used without powder. Would it be likely that defendants would offer to sell nearly all of their powder without trying to sell also the caps and fuse? They made their price on each class of goods offered, and then said, "Should you decide to order these goods." Had plaintiff considered the price for the powder high, and the caps or fuse low, we do not think he could accept or order the caps or fuse alone without the further assent thereto of defendants. Offers of this kind become binding only when the proposition is met with an acceptance which corresponds with it entirely and adequately, without qualification or the addition of new matter. 1 Pars. Cont. (7th Ed.) We do not think this has been done in this case.

The judgment is affirmed.

Agreement to contract in future—What constitutes a final agreement

ST. LOUIS R. R. *v* GORMAN,

79 Kan. 643 (1909).

Action by Thomas Gorman against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error.

BURCH, J.: The defendant is a common carrier, operating a line of railroad running northward through Godfrey, Ft. Scott, and Fulton to Kansas City, Mo. The plaintiff is a stockman who resides at Fulton, north of Ft. Scott, and who keeps cattle at Godfrey, south of Ft. Scott. The

defendant has no office or agent at Godfrey. Desiring to ship several car loads of cattle from Godfrey to Kansas City, the plaintiff made a verbal arrangement to do so with the defendant's agent at Fulton. The arrangement was that cars would be placed at Godfrey, which the plaintiff would load in time to be taken by a certain train, the plaintiff would go with the cattle to Ft. Scott, the defendant would have a shipping contract prepared and ready for signature when the train arrived there, and the plaintiff and his cattle would go through to Kansas City on the train taking them from Godfrey. The defendant had been a regular shipper of cattle for years, knew it was the custom to require shippers to sign written contracts, and had always signed written contracts, but he had never scrutinized, and was not familiar with, their provisions. He did not discuss rates or terms with the agent at Fulton or the conditions of the contract which would be in waiting for him. He did not know what the terms would be, but he expected to be presented with, and intended to sign, just such a written contract as he had been in the habit of shipping under, when he reached Ft. Scott. The cattle were loaded and transported to Ft. Scott as contemplated. At Ft. Scott the defendant had no contract in readiness for signature, no agent at the station, and, after diligent effort, the plaintiff could find nobody with authority to bill his cattle. The train conductor could not take the cattle without proper papers, and the cars containing them were cut out of the train over the plaintiff's objection and protest, were placed on a side track, and the train proceeded to Kansas City without them. The day was hot and sultry, and for several hours the cattle were switched and bumped about the yards, frequently with much violence, or were left standing between lines of other cars so that they suffered greatly from heat, with the result that they were seriously injured. The plaintiff followed them about, getting up those which were knocked down, and otherwise doing what he could to protect them. The plaintiff finally found an agent who made

out a contract, and presented it for signature. The plaintiff was not apprised of its terms, was offered no choice of rates, and was given no option as to conditions of liability on the part of the defendant. He might have read the instrument, but did not. He recognized it as a railroad live stock contract like the kind he had been using, but he was not familiar with what it contained. He told the agent the condition the cattle were then in, and refused to sign. The agent refused to allow the cattle to be shipped unless the plaintiff signed the paper tenderd. Having no alternative, the plaintiff affixed his signature so that he could get his cattle to market. A few hours afterward the cattle were placed in a train which took them to Kansas City. When placed on the market, one animal could not be sold, and five others were weighed back after sale because of broken ribs and bruises. The contract which the plaintiff signed required him to attend and unload his cattle at his own risk and expense. It contained provisions with which he did not comply, which were conditions precedent to the recovery of damages for the injuries sustained. It also provided for his transportation. He went to Kansas City on the train with the cattle, and at Kansas City surrendered the contract to the defendant and received a pass to his home, which he used. The plaintiff sued the defendant for damages, counting upon the common-law liability which attached to the delivery of the cattle to the defendant under the verbal arrangement with the agent at Fulton. The defendant answered, setting up the written contract and pleading noncompliance with its conditions. The plaintiff replied that the writing was signed under duress. The case was submitted on testimony showing the foregoing among other facts. The court instructed the jury respecting the common-law liability of the defendant in the absence of special contract and respecting its limited liability under the written contract, and submitted to the jury the question whether the written contract was signed with such freedom from constraint that it governed the rights of the parties.

The defendant excepted, but made no request for other instructions. The jury found for the plaintiff, and the defendant prosecutes error.

The defendant argues that, when the written contract was signed, it superseded all oral negotiations, and fixed the rights of the parties. It is said that, when the plaintiff signed the contract, he did only what he intended to do from the beginning, and what he agreed to do at the beginning, and hence that the coercion of the agent at Ft. Scott can be given no legal effect. It is not necessary to cite authorities upon the proposition that if the plaintiff freely and voluntarily signed the contract—assuming it to be one which the law will permit—it measures the rights of the parties. The oral arrangement would be at an end, and the plaintiff would be in no position to avoid the force of the limitations placed upon the carrier's liability by the writing. It may be assumed that, if the plaintiff legally bound himself at Fulton to execute the precise contract which was presented to him at Ft. Scott, the claimed coercion was without legal influence. But, if the plaintiff rested under no legal obligation to sign that contract, he could abandon his original intention and refuse to do so; and, if the original intention to sign was rightfully abandoned, any subsequent assent to the terms of the contract would have to be obtained without coercion or it would not bind. In calling upon this court to declare that the plaintiff irrevocably bound himself to sign the very instrument he did sign, the defendant raises a question of fact which he should have asked to have submitted to the jury under proper instructions. There is no evidence that the defendant had a standard form of contract which it invariably used, and which therefore was in the plaintiff's mind. The contract upon which the defendant relies has the following heading: "St. Louis and San Francisco Railroad Company. Read this contract carefully, as numerous changes have been made." How long this form had been in use does not appear, and it cannot be said the plaintiff had any of its provisions in

mind. True, the plaintiff recognized the contract as a railroad live stock contract like the ones he had been using, and such as he expected to sign, but, taking all of his evidence into consideration, a jury would have the right to find that his identification extended no further than to the genus. A man may recognize a trust deed or coupon bond as such and know nothing of its contents, and he may agree to execute such a bond and to secure it by such a deed without agreeing upon any single condition to be inserted in either. All the plaintiff said must be weighed to ascertain its true purport. Statement qualifies statement, and reconciliation is a jury function.

Except that the plaintiff identified this contract as like those he had previously used, which to the jury might have meant nothing, there is no evidence of usual stipulations or customary conditions with which the plaintiff should have been familiar from his previous experience and which should have been in mind; and, except as indicated, there is no evidence that this contract was of a regular, usual, or customary kind. The court is not inclined to declare as a matter of law that a shipper who delivers stock to a carrier for transportation with the understanding that a written contract will be signed intends or binds himself to submit to every condition the carrier may see fit to impose. Under these circumstances, the jury would have been justified in finding that the plaintiff simply agreed to agree upon a contract when he reached Ft. Scott; and it is elementary law that, unless an agreement to make a future contract be definite and certain upon all the subjects to be embraced, it is nugatory. "A contract between two persons, upon a valid consideration, that they will at some specified time in the future, at the election of one of them, enter into a particular contract, specifying its terms, is undoubtedly binding, and, upon a breach thereof, the party having the election or option may recover as damages what such particular contract to be entered into would have been worth to him, if made. But an agreement that they will in the future make

such contract as they may then agree upon amounts to nothing. An agreement to enter into negotiations, and agree upon the terms of a contract, if they can, cannot be made the basis of a cause of action. There would be no way by which the court could determine what sort of a contract the negotiations would result in, no rule by which the court could ascertain whether any, or, if so, what, damages might follow a refusal to enter into such future contract. So, to be enforceable, a contract to enter into a future contract must specify all its material and essential terms, and leave none to be agreed upon as the result of future negotiations. * * * Where a final contract fails to express some matter, as, for instance, a time of payment, the law may imply the intention of the parties, but, where a preliminary contract leaves certain terms to be agreed upon for the purpose of a final contract, there can be no implication of what the parties will agree upon." Shepard *v.* Carpenter, 54 Minn. 153, 55 N. W. 906. Such being the law and the state of the case, it cannot be said that the plaintiff rested under a legal duty to sign the writing in controversy. He was free to refuse to commit himself to any specific agreement. He did refuse, and the Fulton arrangement was then at an end so far as the execution of a shipping contract was concerned. The law required the defendant to accept the plaintiff's stock for transportation without obliging him to agree to sign a special contract, and without coercing him into signing a special contract. A special contract limiting the carrier's common-law liability must be freely and fairly made, or the shipper may repudiate it, and a refusal to transport stock unless the shipper signs a special contract destroys freedom of consent. * * *

Judgment affirmed.

Offer must be definite

SHERMAN *v.* KITSMILLER, ADM.,

17 S. & R. (Penna.) 45 (1827).

Appeal from judgment for defendant.

George Sherman, deceased, promised Mrs. Sherman, plaintiff, his niece, that he would give her 100 acres of land if she would live with him and keep house for him until her marriage. Relying upon this promise, the plaintiff had kept house for him until the time of her marriage. The defendant requested the court among other things to charge the jury that the promise proved was too indefinite to exist. It was 100 acres of land, without describing where it lay or of what value it should be, how it was to be laid off or by whom.

DUNCAN, J.: The error assigned is, that part of a long charge in which the court said, "There can be no recovery, unless there was a legal promise, seriously made; if a promise is so vague in its terms as to be incapable of being understood, and of being carried into effect, it cannot be enforced. If George Sherman had reference to no particular lands, if he did not excite or intend to excite a hope or expectation in Elizabeth Koons, that after her marriage with George S. Sherman she should get any land, such promise would not be so perfect as to furnish the ground of an action for damages. But if George Sherman was seized of several tracts in the vicinity, and he promised her one hundred acres, in such a manner as to excite an expectation in her that it was a particular part of his lands so held by him, though not particularly describing or specifying its value, or by whom; and if, in pursuance of such promise, she did marry George Sherman, then the action might be sustained."

Now let us put the case of the plaintiffs in the most favorable light, without regarding the form of the declaration, and admit that the proof met the allegation, the special promise of the one hundred acres of land, the consideration of the promise, marriage, and its execution, and living with

the defendant's intestate until the marriage, the charge of the court was, in the particular complained of, more favorable to the plaintiffs than their case warranted. It should have been, on the question put to the court, that the promise could not support the action; that the defendant's intestate did not assume to convey any certain things, to convey any certain or particular land, or that could, with reference to anything said by him, refer to anything certain. Whereas the court submitted to the jury whether it did refer to anything certain, viz., lands of the intestate in the vicinity; and that without one spark of evidence to authorize the jury to make such an inference or draw such conclusion. * * * Express promises or contracts ought to be certain and explicit, to a common intent at least. * * * Now here, the court instructed the jury, that if they could find this promise to refer to anything certain, any land in particular, the action could be maintained. This was leaving it to the jury more favorably for the plaintiffs than ought to have been done; for the jury should have been instructed, that as there was nothing certain in the promise, nothing referred to, to render it certain, the action could not be maintained. The contract was an express one—nothing could be raised by implication—no other contract could be implied. * * *

There would in the present case be no specific performance decreed in a court of chancery; the promisor himself would not know what to convey, nor the promisee what to demand. If it had been a promise to give him 100 pieces of silver, this would be too vague to support an action; for what pieces?—fifty-cent pieces or dollars?—what denomination? One hundred cows or sheep would be sufficiently certain, because the intention would be, that they should be at least of a middling quality; but one hundred acres of land, without locality, without estimation of value, without relation to anything which could render it certain, does appear to me to be the most vague of all promises; and, if any contract can be void for its uncertainty, this must be. One hundred acres on the Rocky Mountain, or in the Conestoga

Manor—one hundred acres in the mountain of Hanover County, Virginia, or in the Conewango rich lands of Adams County—one hundred acres of George Sherman's mansion place at eighty dollars per acre, or one hundred acres of his barren lands at five dollars.

This vague and void promise, incapable of specific execution, because it has nothing specific in it, would not prevent the plaintiffs from recovering in a *quantum meruit* for the value of this young woman's services until her marriage. If this promise had been that, in consideration of one hundred pounds, the defendant's testator promised to convey her one hundred acres of land, chancery would not decree a specific performance, or decree a conveyance of any particular land; yet the party could recover back the money he had paid in an action. * * * No evidence was given of the value of the land. The court stated the difficulty of giving damages for not conveying lands of the value of which nothing appeared. The plaintiff's counsel admitted the want of evidence of the value of the land was an incurable defect. If the defect of evidence of value would be incurable, the defect of all allegation or proof of anything by which the value could be regulated, anything to afford a clue to the jury by which to discover what was intended to be given, any measure of damages, would be fatal. * * *

I am therefore of the opinion that there was no error in the opinion of the lower court, by which the plaintiffs have been endamaged; that the law was laid down more favorably for them than the evidence warranted.

Judgment affirmed.

Offer must be definite

FAIRPLAY SCHOOL TOWNSHIP *v.* O'NEAL,

127 Ind. 95 (1890).

Appeal from judgment for plaintiff. (O'Neal.)

A verbal contract was entered into March 31, 1888, by a teacher with the school trustee wherein the teacher undertook to teach the school for the term to be held in the school year 1888, for which the trustee promised to pay her "good wages." The question here involved was whether the promise to pay good wages was an enforceable promise.

ELLIOTT, J.: It is necessary for the information of the citizens that contracts made with teachers should be certain and definite in their terms, otherwise the citizens cannot guard their interests nor observe the conduct of their officer. It is necessary that the contract should be definite and certain in order that when the time comes for the teacher to enter upon duty there may be no misunderstanding as to what her rights are. Any other ruling would put in peril the school interests. Suppose for illustration that a contract providing for "good wages," "reasonable wages," "fair wages," or the like is made, and when the time comes for opening the schools there arises a dispute as to what the compensation shall be, how shall it be determined, and in what mode can the teacher be compelled to go on with the duty he has agreed to perform. Until there is a definite contract it can hardly be said that a teacher has been employed and the public interest demands that there should be a definite agreement before the time arrives for school to open, otherwise the school corporation may be at the mercy of the teacher, or else there be no school. We think that a teacher cannot recover from a school corporation for the breach of an executory agreement unless it is so full and definite as to be capable of specific enforcement.

Judgment reversed.

Offer or acceptance or both may be made by words or conduct

FOGG *v.* PORTSMOUTH ATHENÆUM,

44 N. H. 115 (1862).

Action on contract.

The case was submitted to the decision of the court upon the following agreed statement of facts:

The defendants are a corporation whose object is the support of a library and public reading room, at which latter a large number of newspapers are taken. Some are subscribed and paid for by the defendants; others are placed there gratuitously by the publishers and others; and some are sent there apparently for advertising purposes merely, and of course gratuitously.

The Independent Democrat newspaper was furnished to the defendants, through the mail, by its then publishers, from Vol. 3, No. 1 (May 1, 1847). On the 29th of November, 1848, a bill for the paper, from Vol. 3, No. 1 (May 1, 1847), to Vol. 5, No. 1 (May 1, 1849), two years, at $1.50 per year, was presented to the defendants by one T. H. Miller, agent for the then publishers, for payment. The defendants objected that they had never subscribed for the paper, and were not bound to pay for it. They at first refused on that ground to pay for it, but finally paid the bill to said Miller, and took upon the back thereof a receipt in the following words and figures:

"Nov. 29, 1848.

"The within bill paid this day, and the paper is henceforth to be discontinued.

"T. H. MILLER, for Hood & Co."

Hood & Co. were the publishers of the paper from May 1, 1847, until February 12, 1849, when that firm was dissolved, and the paper was afterwards published by the present plaintiffs. The change of publishers was announced, editorially and otherwise, in the paper of February 15, 1849, and the names of the new publishers were conspicuously inserted in each subsequent number of the paper, but it did

not appear that the change was actually known to Mr. Hatch, the secretary and treasurer of the corporation, who settled the above named bill, and who continued in the office till January, 1850.

The plaintiffs had no knowledge of the agreement of the agent of Hood & Co. to discontinue the paper, as set forth in the receipt of November 29, 1848, until notified thereof by the defendants, after they had furnished the paper to the defendants for a year or more; the books of Hood & Co., which came into their hands, only showing that the defendants had paid for the paper, in advance, to May 1, 1849.

After the payment of the bill and giving of the receipt above recited, the paper continued to be regularly forwarded by its publishers, through the mail, to the defendants, from the date of said receipt until May 1, 1849, the expiration of the period named in said bill; and was in like manner forwarded from May 1, 1849, to January 1, 1860, or from Vol. 5, No. 1, to Vol. 15, No. 35, inclusive, the period claimed to be recovered for in this suit; and was during all that time constantly taken from the post office by the parties employed by the defendants to take charge of their reading room, build fires, etc., and placed in their reading room. Payment was several times demanded during the latter period, of the defendants, by an agent or agents of the plaintiffs; but the defendants refused to pay, on the ground that they were not subscribers for the paper.

Conspicuously printed in each number of the paper sent to and received by the defendants were the following:

"Terms of Publication: By mail, express or carrier, $1.50 a year, in advance; $2 if not paid within the year. No paper discontinued (except at the option of the publisher) unless all arrearages are paid." * * *

NESMITH, J.: There is no pretense upon the agreed statement of this case that the defendants can be charged upon the ground that they were subscribers for the plaintiffs' newspaper, or that they were liable in consequence of the existence of any express contract whatever. But the

question now is, have the defendants so conducted themselves as to make themselves liable to pay for the plaintiffs' newspaper for the six years prior to the date of the plaintiffs' writ, under an implied contract raised by the law and made applicable to this case.

If the seller does in any case what is usual, or what the nature of the case makes convenient and proper, to pass the effectual control of the goods from himself to the buyer this is always a delivery. In like manner as to the question of acceptance, we must inquire into the intention of the buyer, as evinced by his declarations and acts, the nature of the goods, and the circumstances of the case. If the buyer intend to retain possession of the goods, and manifests this intention by a suitable act, it is an actual acceptance of them; or this intention may be manifested by a great variety of acts in accordance with the varying circumstances of each case. 2 Pars. on Con. 325.

Again the law will imply an assumpsit, and the owner of goods has been permitted to recover in this form of action, where they have been actually applied, appropriated, and converted by the defendant to his own beneficial use. Hitchin *v.* Campbell, 2 W. Black, 827. * * *

Where there has been such a specific appropriation of the property in question, the property passes, subject to the vendor's lien for the price. * * *

In Wheatherby *v.* Bonham (5 C. & P. 228) the plaintiff was publisher of a periodical called the Racing Calendar. It appeared that he had for some years supplied a copy of that work, as fast as the numbers came out, to Mr. Westbrook; Westbrook died in the year 1820; the defendant, Bonham, succeeded to Westbrook's property, and went to live in his house, and there kept an inn. The plaintiff, not knowing of Westbrook's death, continued to send the numbers of the Calendar as they were published, by the stage-coach, directed to Westbrook. The plaintiff proved by a servant that they were received by the defendant, and no evidence was given that the defendant had ever offered to

return them. The action was brought to recover the price of the Calendar for the years 1825 and 1826. Talford, for the defendant, objected that there never was any contract between the plaintiff and the present defendant, and that the plaintiff did not know him. But, Lord Tenterden said: "If the defendant received the books and used them, I think the action is maintainable. Where books come addressed to the deceased gentleman whose estate has come to the defendant, and he keeps the books, I think, therefore, he is clearly liable in this form of action, being for goods sold and delivered."

The preceding case is very similar, in many respects, to the case before us. Agreeably to the defendants' settlement with Hood & Co., their contract to take their newspaper expired on the 1st of May, 1849. It does not appear that the fact that the paper was then to stop was communicated to the present plaintiffs, who had previously become the proprietors and publishers of the newspaper establishment; having the defendants' name entered on their books, and having for some weeks before that time forwarded numbers of their newspaper, by mail, to the defendants, they, after the first of May, continued so to do up to January 1, 1860. During this period of time the defendants were occasionally requested, by the plaintiffs' agent, to pay their bill. The answer was, by the defendants, we are not subscribers to your newspaper. But the evidence is, the defendants used, or kept the plaintiffs' books, or newspapers, and never offered to return a number, as they reasonably might have done, if they would have avoided the liability to pay for them. Nor did they ever decline to take the newspapers from the post office.

If the defendants would have avoided the liability to pay the plaintiffs, they might reasonably have returned the paper to the plaintiffs, or given notice that they declined to take the paper longer.

We are of the opinion that the defendants have the right to avail themselves of the statute of limitations.

Therefore, the plaintiffs can recover no more of their account than is embraced in the six years prior to the date of their writ, and at the sum of $2 per year, with interest, from date of writ, or the date of the earliest demand of the plaintiffs' claim upon the defendants.

Offer or acceptance or both may be by words or conduct

HOBBS *v.* MASSASOIT WHIP CO.,

158 Mass. 194 (1893).

Appeal from judgment for plaintiff.

HOLMES, J.: This is an action for the price of eel-skins sent by the plaintiff to the defendant, and kept by the defendant some months, until they were destroyed. It must be taken that the plaintiff received no notice that the defendants declined to accept the skins. The case comes before us on exceptions to an instruction to the jury, that, whether there was any prior contract or not, if the skins are sent to the defendant, and it sees fit, whether it has agreed to take them or not, to lie back, and to say nothing, having reason to suppose that the man who has sent them believes that it is taking them, since it says nothing about it, then if it fails to notify, the jury would be warranted in finding for the plaintiff.

Standing alone, and unexplained, this proposition might seem to imply that one stranger may impose a duty upon another, and make him a purchaser, in spite of himself, by sending goods to him, unless he will take the trouble, and be at the expense of notifying the sender that he will not buy. The case was argued for the defendant on that interpretation. But, in view of the evidence, we do not understand that to have been the meaning of the judge, and we do not think that the jury can have understood that to have

been his meaning. The plaintiff was not a stranger to the defendant, even if there was no contract between them. He had sent eel-skins in the same way four or five times before, and they had been accepted and paid for. On the defendant's testimony, it is fair to assume that, if it had admitted the eel-skins to be over 22 inches in length, and fit for its business, as the plaintiff testified, and the jury found that they were, it would have accepted them; that this was understood by the plaintiff; and, indeed, that there was a standing offer to him for such skins. In such a condition of things, the plaintiff was warranted in sending the defendant skins conforming to the requirements, and even if the offer was not such that the contract was made as soon as skins corresponding to its terms were sent, sending them did impose on the defendant a duty to act about them; and silence on its part, coupled with a retention of the skins, for an unreasonable time, might be found by the jury to warrant the plaintiff in assuming that they were accepted, and thus to amount to an acceptance. * * * The proposition stands on the general principle that conduct which imports acceptance or assent is acceptance or assent in the view of the law, whatever may have been the actual state of mind of the party—a principle sometimes lost sight of in the cases. * * * O'Donnell *v.* Clinton, 145 Mass. 461.

Judgment affirmed.

Seriousness of intent

KELLER *v.* HOLDERMAN,

11 Mich. 248 (1863).

Appeal from judgment for plaintiff.

Action by Holderman against Keller upon a check for $300 drawn by Keller upon a banker at Niles and not honored. The cause was tried without a jury and the circuit

judge found as facts that the check was given for an old silver watch worth about $15 which Keller took and kept until the day of trial, when he offered to return it to the plaintiff [Holderman was the plaintiff below], who refused to receive it. The whole transaction was a frolic and banter—the plaintiff not expecting to sell nor the defendant intending to buy the watch at the sum for which the check was drawn. The defendant when he drew the check had no money in the banker's hands, and had intended to insert a condition in the check that would prevent his being liable upon it; but as he had failed to do so, and had retained the watch, the judge held him liable, and judgment was rendered against him for the amount of the check.

MARTIN, C. J.: When the court below found as a fact that "the whole transaction between the parties was a *frolic and a banter,* the plaintiff not expecting to sell, nor the defendant intending to buy the watch at the sum for which the check was drawn," the conclusion should have been that no contract was ever made by the parties, and the finding should have been that no cause of action existed upon the check to the plaintiff.

The judgment of the lower court reversed.

Seriousness of intent—Promissory expressions

HIGGINS *v.* LESSIG,

49 Ill. App. 459 (1893).

Appeal from judgment for plaintiff (appellee).

CARTWRIGHT, J.: Appellant was the owner of a set of old double harness, worth perhaps $15, which was taken from his premises without his knowledge, and he offered a reward of $100 for the recovery of the harness and the conviction of the thief. A few days afterward a boy named Wilt found part of the harness in appellee's berry patch,

and the appellant went with appellee to the place and brought that part of the harness into appellee's blacksmith shop. Appellant gave the boy who had found the harness a quarter of a dollar, and said he would give him a dollar to find the rest of it. Appellee claims that appellant at that time offered a reward of $100 to the one who would find out who the thief was, and that he earned the reward. This suit was brought to recover the amount so claimed as a reward, and a trial resulted in a verdict and judgment for appellee for $100.

The evidence showed that the defendant was much excited on the occasion, when it is claimed that the offer was made in the shop. Plaintiff's version of the language used was that defendant said, "I will give $100 to any man who will find out who the thief is, and I will give a lawyer $100 for prosecuting him," using rough language and epithets concerning the thief. There was evidence of substantial repetitions of the statement, together with the assertion that he would not have a second-class lawyer, either, and that he would not hire a cheap lawyer, but a good lawyer. The harness had been taken by a man called Red John Smith, who had been adjudged insane, and a Mrs. Phillips told the plaintiff that she saw Smith walking by with the harness on his back, on Sunday morning, which was the time when it was taken. Plaintiff watched Smith that night and saw him hiding the collars, and the next day he waited for the return of the defendant from Galesburg, and told him that Red John Smith had the harness. A search warrant was procured, and the remainder of the harness was found.

We do not think that the language used was such as, under the circumstances, would show an intention to contract to pay a reward, and think plaintiff had no right to regard it as such. Defendant had previously offered a very liberal reward for the return of the old harness and the conviction of the thief. On this occasion he paid the boy only a trifling sum, and offered only $1 for finding the rest

of the property. His further language was in the nature of an explosion of wrath against some supposed thief who had stolen the harness, and was coupled with boasting and bluster about the prosecution of the thief. It was indicative of a state of excitement so out of proportion to the supposed cause of it, that it should be regarded rather as the extravagant exclamation of an excited man than as manifesting an intention to contract.

Judgment reversed.

Seriousness of intent—Promissory expressions

REIF *v. PAIGE,*

55 Wis. 496 (1882).

Appeal by plaintiff from a non-suit.

During the afternoon of December 3, 1880, the "Beckwith House," in Oshkosh, was destroyed by fire. The defendant and his wife lived in this hotel, occupying rooms in the fourth story. When the fire broke out Mrs. Paige was in those rooms and perished in the flames. The members of the fire department placed a ladder at a window near where Mrs. Paige was supposed to be, and at least two firemen attempted to enter the window and rescue her, but were driven back by the smoke and flames. The ladder was then removed, but subsequently was replaced at the same window. About this time, and after the fire had been raging 30 minutes or more, the defendant, who had been absent, reached the scene of the fire, and, as it is alleged in the complaint, offered and promised to pay a reward of $5000 to any person who would rescue his wife from the burning building dead or alive. The plaintiff claims that he has earned the reward thus offered, and has brought this action to recover the same.

The complaint alleges that the plaintiff, on being informed of such offer and promise, and confiding in and

relying upon the same, entered such rooms in the fourth story of the burning building, at great peril to his life and health, removed therefrom the dead body of Mrs. Paige and delivered the same to the defendant. Also that no part of the said $5000 has been paid to him, and that the same is now due and payable. * * *

The testimony on the trial tended to prove that the defendant offered the reward and that with knowledge of the offer and on the faith of it, and for the purpose of earning the reward, the plaintiff ascended the ladder, entered the building and rescued the dead body of Mrs. Paige from the flames to the knowledge of the defendant. No formal notice was given by the plaintiff to the defendant before this action was commenced that the former had acted in the premises upon such offer and claimed the reward, and no demand therefor was made upon the defendant. The circuit court non-suited the plaintiff, and judgment against him was entered accordingly. The plaintiff appealed.

LYON, J.: * * * The offer of a reward by the defendant for rescuing the body of his wife, and the rescue of her remains by the plaintiff with knowledge of such offer, and with a view to obtaining the reward offered, constituted a contract between parties, which was fully and completely executed by the plaintiff. The offer which the proofs tend to show the defendant made, was, in substance, "I will give $5000 to any person who will bring the body of my wife out of that building, dead or alive." There was no restrictions or limitations to the offer, and no additional requirement upon the claimant of the offered bounty. Hence when the plaintiff, with a view to obtaining the offered reward, rescued the body of Mrs. Paige, he had done all that the offer required him to do, and if he has any cause of action it was then complete. * * *

The learned circuit judge non-suited the plaintiff on the ground that it was his duty as a paid officer and member of the fire department of Oshkosh to rescue persons as well as property from fires, and that it was against sound public

policy to allow him to contract for a reward for recovering the body of Mrs. Paige. * * *

There was considerable discussion by counsel as to what are the duties of firemen. We know of no guide for ascertaining these duties other than the charter of the municipality, in which they are employed, and the ordinances or by-laws enacted pursuant thereto. The ordinances of the city of Oshkosh in respect to its fire department were read in evidence, and reference made to the city charter in that behalf. We do not care to comment upon these, for we are clear that there is nothing in them which made it the duty of the plaintiff to enter the fourth story of the burning building and rescue the body of Mrs. Paige from the flames, at the imminent hazard of losing his own life. That he incurred such hazard there can be no doubt from the testimony. He did not, as does a soldier, contract to risk his life in the service. The most that can reasonably be claimed is that, short of risking his life, he contracted to use his best judgment and efforts in extinguishing fires, and in saving persons and property from destruction or injury. But it is quite doubtful whether a fireman employed under the charter and ordinances of Oshkosh owes any duty *as a fireman* to rescue persons from burning buildings. * * *

It follows, that inasmuch as the plaintiff could not rescue the body of Mrs. Paige from the burning building without imminent peril of losing his own life, and inasmuch as it was not his duty as a paid officer and member of the fire department to do so, he is in a position to claim the reward alleged to have been offered by the defendant for such rescue.

Judgment of non-suit must be reversed and the cause remanded for a new trial.

Seriousness of intent—Invitation to purchase

MOULTON *v.* KERSHAW ET AL.,

59 Wis. 316 (1884).

Appeal from order overruling a demurrer to plaintiff's complaint.

The case is thus stated by Mr. Justice TAYLOR:

"The complaint alleges that the defendants were dealers in salt in the city of Milwaukee, including salt of the Michigan Salt Association; that the plaintiff was a dealer in salt in the city of La Crosse, and accustomed to buy salt in large quantities, which fact was known to the defendants; that on the 19th day of September, 1882, the defendant, at Milwaukee, wrote and posted to the plaintiff at La Crosse a letter, of which the following is a copy:

"'Milwaukee, September 19, 1882.

"'J. H. Moulton, Esq., La Crosse, Wis.—Dear Sir: In consequence of a rupture in the salt trade, we are authorized to offer Michigan fine salt, in full car-load lots of eighty to ninety-five bbls., delivered at your city, at 85c per bbl., to be shipped per C. & N. W. R. R. Co. only. At this price it is a bargain, as the price in general remains unchanged. Shall be pleased to receive your order.

"'Yours truly,

"'C. J. KERSHAW & SON.'

"The balance of the complaint reads as follows: 'And this plaintiff alleges, upon information and belief, that said defendants did not send said letter and offer by authority of, or as agents of, the Michigan Salt Association, or any other party, but on their own responsibility. And the plaintiff further shows that he received said letter in due course of mail, to wit, on the 20th day of September, 1882, and that he, on that day, accepted the offer in said letter contained, to the amount of two thousand barrels of salt therein named, and immediately, and on said day, sent to said defendants at Milwaukee a message by telegraph, as follows:

"'La Crosse, September 20, 1882.

"'To C. J. Kershaw & Son, Milwaukee, Wis.—Your letter of yesterday received and noted. You may ship me two thousand (2000) barrels Michigan fine salt, as offered in your letter. Answer.

"'J. H. MOULTON.'

"That although said defendants received said acceptance and order of this plaintiff on the 20th day of September, 1882, they attempted, on the 21st day of September, 1882, to withdraw the offer contained in their said letter of September 19, 1882, and did, on said 21st day of September, 1882, notify this plaintiff of the withdrawal of said offer on their part, that this plaintiff thereupon demanded of the defendants the delivery to him of two thousand barrels of Michigan fine salt, in accordance with the terms of said offer, accepted by this plaintiff as aforesaid, and offered to pay them therefor in accordance with said terms, and this plaintiff was ready to accept said two thousand barrels, and ready to pay therefor in accordance with said terms. Nevertheless, the defendants utterly refused to deliver the same, or any part thereof, by reason whereof this plaintiff sustained damage to the amount of eight hundred dollars.

"To this complaint the defendants interposed a general demurrer. The Circuit Court overruled the demurrer, and from the order overruling the same the defendants appeal to this Court."

TAYLOR, J.: The only question presented is whether the appellants' letter, and the telegram sent by the respondent in reply thereto, constitute a contract for the sale of 2000 barrels of Michigan fine salt by the appellants to the respondent at the price named in such letter.

The counsel for the respondent claims that the letter of the appellants is an offer to sell to the respondent, on the terms mentioned, any reasonable quantity of Michigan fine salt that he might see fit to order, not less than one carload. On the other hand, the counsel for the appellants claim that the letter is not an offer to sell any specific quantity of salt, but simply a letter such as a business man would send out to customers or those with whom he desired to trade, soliciting their patronage. To give the letter of the appellants the construction claimed for it by the learned counsel for the respondent, would introduce such an element of uncertainty into the contract as would necessarily

render its enforcement a matter of difficulty, and in every case the jury trying the case would be called upon to determine whether the quantity ordered was such as the appellants might reasonably expect from the party. This question would necessarily involve an inquiry into the nature and extent of the business of the person to whom the letter was addressed, as well as to the extent of the business of the appellants. So that it would be a question of fact for the jury in each case to determine whether there was a binding contract between the parties. And this question would not in any way depend upon the language used in the written contract, but upon proofs to be made outside of the writings. As the only communications between the parties, upon which a contract can be predicated, are the letter and the reply of the respondent, we must look to them, and nothing else, in order to determine whether there was a contract in fact. We are not at liberty to help out the written contract, if there be one, by adding by parol evidence additional facts to help out the writing so as to make out a contract not expressed therein. If the letter of the appellants is an offer to sell salt to the respondent on the terms stated, then it must be held to be an offer to sell any quantity at the option of the respondent not less than one carload. The difficulty and injustice of construing the letter into such an offer is so apparent that the learned counsel for the respondent do not insist upon it, and consequently insist that it ought to be construed as an offer to sell such quantity as the appellants, from their knowledge of the business of the respondent, might reasonably expect him to order.

Rather than introduce such an element of uncertainty into the contract, we deem it much more reasonable to construe the letter as a simple notice to those dealing in salt that the appellants were in a condition to supply that article for the prices named, and requesting the person to whom it was addressed to deal with them. This case is one where it is eminently proper to heed the injunction of JUSTICE

FOSTER in the opinion in Lyman *v.* Robinson, 14 Allen 254: "That care should always be taken not to construe as an agreement letters which the parties intended only as preliminary negotiations."

We do not wish to be understood as holding that a party may not be bound by an offer to sell personal property, where the amount or quantity is left to be fixed by the person to whom the offer is made, when the offer is accepted and the amount or quantity fixed before the offer is accepted and the amount or quantity fixed before the offer is withdrawn. We simply hold that the letter of the appellants in this case was not such an offer. If the letter had said to the respondent we will sell you all the Michigan fine salt you will order, at the price and on the terms named, then it is undoubtedly the law that the appellants would have been bound to deliver any reasonable amount the respondent might have ordered, possibly any amount, or make good their default in damages.

We place our opinion upon the language of the letter of the appellants, and hold that it cannot be fairly construed into an offer to sell to the respondent any quantity of salt he might order, nor any reasonable amount he might see fit to order. The language is not such as a business man would use in making an offer to sell to an individual a definite amount of property. The word "sell" is not used. They say, "we are authorized to offer Michigan fine salt," etc., and volunteer an opinion that at the terms stated it is a bargain. They do not say, we offer to sell to you. They use general language proper to be addressed generally to those who were interested in the salt trade. It is clearly in the nature of an advertisement or business circular, to attract the attention of those interested in that business to the fact that good bargains in salt could be had by applying to them, and not as an offer by which they were to be bound, if accepted, for any amount the persons to whom it was addressed might see fit to order. We think the complaint fails to show any contract between the parties, and the demurrer should have been sustained.

By the Court.—The order of the circuit court is reversed, and the cause remanded for further proceedings according to law.

Seriousness of intent—Competitive bids as offers

LESKIE *v.* HAZELTINE,

155 Pa. 98 (1893).

Appeal from judgment for defendant.

This was an action on an alleged agreement to award a building contract. At the trial it appeared that by a letter dated March 28, 1887, the defendant requested the plaintiff to bid for the contract of erecting the Hazeltine Building in Philadelphia. Plaintiff complied with the request and presented a bid which was found to be the lowest bid. Plaintiff testified that when the bids were opened defendant said to him: "You are the lucky man * * * You have won, and fairly so." Plaintiff further testified in effect that he was to begin work as soon as the contract was signed. The court charged the jury in part as follows: * * * "It is incumbent upon the plaintiff, before he is entitled to a verdict in this case, to satisfy you by the evidence that there was a distinct promise made to him, a distinct agreement made with him; not merely that there was talk about his being the successful bidder and his probably getting the contract, but he must show that at some time the defendant, or somebody authorized to speak for the defendant, entered into that agreement with him, not that he talked about it.

Editor's Note.—General advertisements in newspapers, by department stores are mere quotations of prices. Expressions laudatory of the commodity presented to the public, or to a person, are not to be taken as constituting any part of an offer and do not bind the one using such expressions. (Carlill v. Carbolic Smoke Ball Co., 1 Q. B. 256.)

"It is a very serious question in my mind whether there is evidence in this case which would justify you in reaching the conclusion that there was at any time any such agreement entered into, that the minds of the defendant and plaintiff ever met upon a distinct agreement that the plaintiff should have this contract, and I say to you at this point * * * that the mere fact that the plaintiff was the lowest bidder gave him no right whatever to get the contract. It was not necessary to put in the invitation for bids or the specifications that the owner of the ground reserved the right to reject the lowest bidder or any other. * * *

Verdict and judgment for defendant. Plaintiff appealed.

PER CURIAM: The plaintiff was admittedly the lowest bidder for the erection of the defendant's building. It does not follow, however, that because he was the lowest bidder the defendant was bound to award him the contract. The fact that, upon the opening of the bids, either the architect or the defendant may have said to the plaintiff: "You are the lucky man," amounts to nothing more than the recognition of the fact that he was the lowest bidder. After the bids had been opened, it was the right of the defendant to inquire into the fitness and ability of the respective bidders to fulfill the contract. He was not bound to award it to a bidder who lacked either the skill, experience, or ability to properly perform the contract. In this case the contract never was awarded to the plaintiff. There were a number of questions to be settled, when the defendant and the bidder were brought together, before their minds could be said to have agreed upon anything.

The learned judge below submitted the case to the jury under proper instructions, and their verdict is the end of the matter.

Judgment affirmed.

Offer must be communicated

FITCH *v.* SNEDAKER,

38 N. Y. 238 (1868).

Appeal by plaintiff from a non-suit.

WOODRUFF, J.: On the 14th of October, 1859, the defendant caused a notice to be published, offering a reward of two hundred dollars * * * "to any person or persons who will give such information as shall lead to the apprehension and conviction of the person or persons guilty of the murder" of a certain unknown female.

On the 15th day of October, before the plaintiffs had seen or heard of the offer of this reward, one Fee was arrested and put in jail, and though not in terms so stated, the case warrants the inference, that, by means of the evidence given by the plaintiffs on his trial and their efforts to procure testimony, Fee was convicted.

This action is brought to recover the reward so offered. On the trial the plaintiffs proved the publication of the notice, and then proposed to prove that they gave information before the notice was known to them, which led to the arrest of Fee. This evidence was excluded. The plaintiffs then offered to prove that, with a view to this reward, they spent time and money, made disclosures to the district attorney, to the grand jury and to the court on the trial after Fee was in jail, and that, without their effort, evidence and exertion, no indictment or conviction could have been held. This evidence was excluded. The court thereupon directed a non-suit.

It is entirely clear, that, in order to entitle any person to the reward offered in this case, he must give such information as shall lead to both apprehension and conviction. That is, both must happen, and happen as a consequence of the information given. No person could claim the reward whose information caused the apprehension until conviction followed; both are conditions precedent. No one could therefore claim the reward who gave no information what-

ever until after the apprehension, although the information he afterward gave was the evidence upon which conviction was had, and, however clear, that, had the information been concealed or suppressed, there could have been no conviction. This is according to the plain terms of the offer of the reward, and is held in Jones v. The Phoenix Bank, 8 N. Y. 228; Thatcher v. England, 3 Com. Bench, 254.

In the last case it was distinctly held, that, under an offer of reward, payable "on recovery of property stolen and conviction of the offender," a person who was active in arresting the thief and finding and restoring part of the stolen property, giving information to the magistrates, tracing to London other of the property and producing pawnbrokers with whom the prisoner had pledged it, and who incurred much trouble and expense in bringing together witnesses for the prosecution, was not entitled to the reward, as it appeared that another person gave the first information as to the party committing the robbery.

In the present case, the plaintiff after the advertisement of the defendant's offer of a reward came to his knowledge, did nothing toward procuring the arrest, nor which led thereto, for at that time Fee had already been arrested.

The cases above referred to, therefore, establish that, if no information came from the plaintiffs which led to the arrest of Fee, the plaintiffs are not entitled to recover, however much the information they subsequently gave, and the efforts they made to procure evidence, may have contributed to or even have caused his conviction, and, therefore, evidence that it was their efforts and information which led to his conviction was wholly immaterial, if they did not prove that they had given information which led to his apprehension, and was properly rejected.

The question in this case is simple. A murderer having been arrested and imprisoned in consequence of information given by the plaintiff before he is aware that a reward

is offered for such apprehension, is he entitled to claim the reward in case conviction follows?

The ruling on the trial, excluding all evidence of information given by the plaintiffs before they heard of this reward, necessarily answers this question in the negative. * * *

I perceive, however, no reason for applying to an offer of reward for the apprehension of a criminal any other rules than are applicable to any other offer by one accepted or acted upon by another, and so relied upon as constituting a contract.

The form of action in all such cases is assumpsit. The defendant is proceeded against as upon his contract to pay, and the first question is was there a contract between the parties?

To the existence of a contract there must be mutual assent, or in another form offer and consent to the offer. The *motive* inducing consent may be immaterial, but the consent is vital. Without that there is no contract. How then can there be consent or assent to that of which the party has never heard? On the 15th day of October, 1859, the murderer, Fee, had in consequence of information given by the plaintiffs, been apprehended and lodged in jail. But the plaintiffs did not, in giving that information, manifest any assent to the defendant's offer, nor act in any sense in reliance thereon, they did not know of its existence. The information was voluntary, and in every sense (material to this case) gratuitous. The offer could only operate upon the plaintiffs after they heard of it. It was *prospective* to those who will, in the future, give information, etc.

An offer cannot become a contract unless acted upon or assented to.

Such is the elementary rule in defining what is essential to a contract. Chitty on Con. (5th Am. ed.), Perkins' notes, p. 10, 9, and 2, and cases cited. Nothing was here done to procure or lead to Fee's apprehension in view of this reward. Indeed, if we were at liberty to look at the

evidence on the first trial, it would appear that Fee was arrested before the defendant offered the reward.

I think the evidence was properly excluded and the non-suit necessarily followed.

Judgment affirmed.

Acceptance must be communicated

ROYAL INS. CO. *v.* BEATTY,

119 Pa. 6 (1888).

Appeal from judgment for plaintiff in an action of assumpsit to recover upon two policies of insurance.

At the close of the testimony, the defendant requested the court to charge the jury: That there was no evidence of an acceptance, by the defendant of the offer of the plaintiff to renew the policies, and the verdict of the jury must be for the defendant. The court refused to affirm this point, and submitted the cause upon the evidence, and there was a verdict for plaintiff.

GREEN, J.: We find ourselves unable to discover any evidence of a contractual relation between the parties to this litigation. The contract alleged to exist was not founded upon any writing, nor upon any words, nor upon any act done by the defendant. It was founded alone upon silence. While it must be conceded that circumstances may exist which will impose a contractual obligation by mere silence, yet it must be admitted that such circumstances are exceptional in their character and of extremely rare occurrence. We have not been furnished with a perfect instance of the kind by the counsel on either side of the present case. Those cited for defendant in error had some other element in them than mere silence, which contributed to the establishment of the relation.

But in any point of view it is difficult to understand how a legal liability can arise out of the mere silence of

the party sought to be affected, unless he was subject to a duty of speech, which was neglected to the harm of the other party. If there was no duty of speech, there could be no harmful omission arising from mere silence. Take the present case as an illustration. The alleged contract was a contract of fire insurance. The plaintiff held two policies against the defendant, but they had expired before the loss occurred and had not formally been renewed. At the time of the fire, the plaintiff held no policy against the defendant. But he claims that the defendant agreed to continue the operation of the expired policies by what he calls "binding" them. How does he prove this? He calls a clerk, who took the two policies in question, along with other policies of another person, to the agent of the defendant to have them renewed, and this is the account he gives of what took place: "The Royal Company had some policies to be renewed, and I went in and bound them. Q. State what was said and done. A. I went into the office of the Royal Company and asked them to bind the two policies of Mr. Beatty expiring to-morrow. The Court: Who were the policies for? A. Mr. Beatty. The Court: That is your name, is it not? A. Yes, sir. These were the policies in question. I renewed the policies of Mr. Priestly up to the 1st of April. There was nothing more said about the Beatty policies at that time. The Court: What did they say? A. They did not say anything, but I suppose that they went to their books to do it. They commenced to talk about the night privilege, and that was the only subject discussed." In his further examination he was asked: "Q. Did you say anything about those policies (Robert Beatty's) at that time? A. No, sir; I only spoke of the two policies for William Beatty. Q. What did you say about them? A. I went in and said, 'Mr. Skinner, will you renew the Beatty policies and the night privilege for Mr. Priestly,' and that ended it. Q. Were the other companies bound in the same way? A. Yes, sir; and I asked the Royal Company to bind Mr. Beatty."

The foregoing is the whole of the testimony for the plaintiff as to what was actually said at the time when it is alleged the policies were bound. It will be perceived that all that the witness says is, that he asked the defendant's agent to bind the two policies, as he states at first, or to renew them, as he says last. He received no answer, nothing was said, nor was anything done. How is it possible to make a contract out of this? It is not as if one declares or states a fact in the presence of another and the other is silent. If the declaration imposed a duty of speech on peril of an inference from silence, the fact of silence might justify the inference of an admission of the truth of the declared fact. It would then be only a question of hearing, which would be chiefly if not entirely for the jury. But here the utterance was a question and not an assertion, and there was no answer to the question. Instead of silence being evidence of an agreement to do the thing requested, it is evidence, either that the question was not heard or that it was not intended to comply with the request. Especially is this the case, when, if a compliance was intended, the request would have been followed by an actual doing of the things requested. But this was not done; how then can it be said it was agreed to be done? There is literally nothing upon which to base the inference of an agreement, upon such a state of facts. Hence the matter is for the Court and not for the jury; for if there may not be an inference of the controverted fact, the jury must not be permitted to make it.

What has thus far been said relates only to the effect of the non-action of the defendant, either in responding or in doing the thing requested. There remains for consideration the effect of the plaintiff's non-action. When he asked the question whether defendant would bind or renew the policies and obtained no answer, what was his duty? Undoubtedly, to repeat his question until he obtained an answer. For his request was that the defendant should make a contract with him, and the defendant says noth-

ing. Certainly such silence is not an assent in any sense. There should be something done, or else something said before it is possible to assume that a contract was established. There being nothing done and nothing said, there is no footing upon which an inference of an agreement can stand. But what was the position of the plaintiff? He had asked the defendant to make a contract with him and the defendant had not agreed to do so; he had not even answered the question whether he would do so. The plaintiff knew he had obtained no answer, but he does not repeat the question; he, too, is silent thereafter, and he does not get the thing done which he asks to be done. Assuredly it was his duty to speak again, and to take further action if he really intended to obtain the defendant's assent For what he wanted was something affirmative and positive, and without it he has no status. But he desists, and says nothing further. And so it is that the whole of the plaintiff's case is an unanswered request to the defendant to make a contract with the plaintiff, and no further actual attempt by the plaintiff to obtain an answer, and no actual contract made. Out of such facts it is not possible to make a legal inference of a contract.

The other facts proved and offered to be proved, but rejected improperly, as we think, and supposed by each to be consistent with his theory, tend much more strongly in favor of the defendant's theory than of the plaintiff's. It is not necessary to discuss them, since the other views we have expressed are fatal to the plaintiff's claim. Nor do I concede that if defendant heard plaintiff's request and made no answer, an inference of assent should be made. For the hearing of a request, and not answering it is as consistent, indeed more consistent, with a dissent than an assent. If one is asked for alms on the street, and hears the request, but makes no answer, it certainly cannot be inferred that he intends to give them. In the present case there is no evidence that defendant heard the plaintiff's request, and without hearing there was, of course, no duty of speech.

Judgment reversed.

What amounts to communication of acceptance—Constructive acceptance

TAYLOE *v.* MERCHANTS' FIRE INS. CO.

9 Howard (U. S.) 390 (1850.)

NELSON, J.: This is an appeal from a decree of the Circuit Court for the District of Maryland, which was rendered for the defendants.

The case in the court below was this: William H. Tayloe, of Richmond County, Virginia, applied to John Minor, the agent of the defendants, residing at Fredericksburg in that State, for an insurance upon his dwelling house to the amount of $8,000 for one year, and, as he was about leaving home for the State of Alabama, desired the agent to make the application in his behalf.

The application was made accordingly, under the date of 25th November, 1844, and an answer received from the secretary of the company, stating that the risk would be taken at seventy cents on the thousand dollars, the premium amounting to the sum of $56. The agent stated in the application to the company the reason why it had not been signed by Tayloe; that he had gone to the State of Alabama on business and would not return till February following; and that he was desired to communicate to him at that place the answer of the company.

On receiving the answer, the agent mailed a letter directed to Tayloe, under date of the 2d of December, advising him of the terms of the insurance, and adding, "Should you desire to effect the insurance, send me your check payable to my order for $57, and the business is concluded." The additional dollar was added for the policy.

This letter, in consequence of a misdirection, did not reach Tayloe till the 20th of the month; who, on the next day, mailed a letter in answer to the agent, expressing his assent to the terms, and inclosing his check for the premium as requested. He also desired that the policy should be deposited in the bank for safe-keeping. This letter of accept-

ance was received on the 31st at Fredericksburg by the agent, who mailed the letter in answer the next day, communicating to Tayloe his refusal to carry into effect the insurance, on the ground that his acceptance came too late, the centre building of the dwelling house in the meantime on the 22d of the month, having been consumed by fire.

The company, on being advised of the facts, confirmed the view taken of the case by their agent, and refused to issue the policy or pay the loss.

A bill was filed in the court below by the insured against the company, setting forth, substantially, the above facts, and praying that the defendants might be decreed to pay the loss, or for such other relief as the complainant might be entitled to.

I. Several objections have been taken to the right of the complainant to recover, which it will be necessary to notice; but the principal one, is that the contract of insurance was not complete at the time the loss happened, and therefore that the risk proposed to be assumed had never attached.

Two positions have been taken by the counsel for the company for the purpose of establishing this ground of defense.

1. The want of notice to the agent of the company of the acceptance of the terms of the insurance; and,

2. The non-payment of the premium.

The first position assumes that, where the company have made an offer through the mail to insure upon certain terms, the agreement is not consummated by the mere acceptance of the offer by the party to whom it is addressed; that the contract is still open and incomplete until the notice of acceptance is received; and that the company are at liberty to withdraw the offer at any time before the arrival of the notice; and this even without communicating notice of the withdrawal to the applicant; in other words, that the assent of the company, expressed or implied, after the

acceptance of the terms proposed by the insured, is essential to a consummation of the contract.

The effect of this construction is, to leave the property of the insured uncovered until his acceptance of the offer has reached the company, and has received their assent; for, if the contract is incomplete, until notice of the acceptance, till then the company may retract the offer, as neither party is bound until the negotiation has resulted in a complete bargain between the parties.

In our apprehension, this view of the transaction is not in accordance with the usages and practice of these companies in taking risks; nor with the understanding of merchants and other business men dealing with them; nor with the principles of law, settled in analogous cases, governing contracts entered into by correspondence between parties residing at a distance.

On the contrary, we are of the opinion that an offer under the circumstances stated, prescribing the terms of insurance, is intended, and is to be deemed, a valid undertaking on the part of the company, that they will be bound, according to the terms tendered, if an answer is transmitted in due course of mail, accepting them; and that it cannot be withdrawn, unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing the acceptance has been transmitted.

This view to the effect of the correspondence seems to us to be but carrying out the intent of the parties, as plainly manifested by their acts and declarations.

On the acceptance of the terms proposed, transmitted by due course of mail, to the company, the minds of both parties have met on the subject, in the mode contemplated at the time of entering upon the negotiation, and the contract becomes complete. The party to whom the proposal is addressed has a right to regard it as intended as a continuing offer until it shall have reached him, and shall be in due time accepted or rejected.

Such is the plain import of the offer. And, besides, upon any other view, the proposal amounts to nothing, as the acceptance would be but the adoption of the terms tendered, to be, in turn, proposed by the applicant to the company for their approval or rejection. For, if the contract is still open until the company is advised of an acceptance, it follows, of course, that the acceptance may be repudiated at any time before the notice is received. Nothing is effectually accomplished by an act of acceptance.

It is apparent, therefore, that such an interpretation of the acts of the parties would defeat the object which both had in view in entering upon the correspondence.

The fallacy of the argument, in our judgment, consists in the assumption, that the contract cannot be consummated without a knowledge on the part of the company that the offer has been accepted. This is the point of the objection. But a little reflection will show, that in all cases of contracts entered into between parties at a distance by correspondence, it is impossible that both should have a knowledge of it the moment it becomes complete. This can only exist where both parties are present.

The position may be illustrated by the case before us. If the contract become complete, as we think it did, on the acceptance of the offer by the applicant, on the 21st of December, 1844, the company, of course, could have no knowledge of it until the letter of acceptance reached the agent, on the 31st of the month; and, on the other hand, upon the hypothesis it was not complete until notice of the acceptance, and then became so, the applicant could have no knowledge of it at the time it took effect. In either aspect, and indeed, in any respect in which the case can be presented, one of the parties must be unadvised of the time when the contract takes effect, as its consummation must depend upon the act of one of them in the absence of the other.

The negotiation being carried on through the mail, the offer and acceptance cannot occur at the same moment of time; nor, for the same reason, can the meeting of the

minds of the parties on the subject be known by each at the moment of concurrence; the acceptance must succeed the offer after the lapse of some interval of time; and if the process is to be carried farther in order to complete the bargain, and notice of the acceptance must be received, the only effect is to reverse the position of the parties, changing the knowledge of the completion from the one party to the other.

It is obviously impossible, therefore, under the circumstances stated, ever to perfect a contract by correspondence, if a knowledge of both parties at the moment they become bound is an essential element in making out the obligation. And as it must take effect, if effect is given at all to an endeavor to enter into a contract by correspondence, in the absence of the knowledge of one of the parties at the time of its consummation, it seems to us more consistent with the acts and declarations of the parties, to consider it complete on the transmission of the acceptance of the offer in the way they themselves contemplated; instead of postponing its completion till notice of such acceptance has been received and assented to by the company.

For why make the offer, unless intended that an assent to its terms should bind them? And why require any further assent on their part, after an unconditional acceptance by the party to whom it is addressed?

We have said that this view is in accordance with the usages and practice of these companies, as well as with the general principles of law governing contracts entered into by absent parties.

In the instructions of this company to their agent at Fredericksburg, he is advised to transmit all applications for insurance to the office for consideration; and that, upon the receipt of an answer, if the applicant accepts the terms, the contract is considered complete without waiting to communicate the acceptance to the company; and the policy to be thereafter issued is to bear date from the time of the acceptance.

The company desire no further communication on the subject, after they have settled upon the terms of the risk, and sent them for the inspection of the applicant, in order to consummate the bargain. The communication of the acceptance by the agent afterwards is to enable them to make out the policy. The contract is regarded as complete on the acceptance of the terms.

This appears, also, to have been the understanding of the agent; for, on communicating to the insured the terms received from the company, he observes, "Should you desire to effect the above insurance, send me your check payable to my order for fifty-seven dollars, and the business is concluded;" obviously enough importing, that no other step would be necessary to give effect to the insurance of the property upon the terms stated.

The cases of Adams *v.* Lindsell (V. Barn. & Ald. 681) and Mactier's Adm'rs. *v.* Frith (16 Wend. 104) are authorities to show that the above view is in conformity with the general principles of law governing the formation of all contracts entered into between parties residing at a distance by means of correspondence.

The unqualified acceptance by the one of the terms proposed by the other, transmitted by due course of mail, is regarded as closing the bargain from the time of the transmission of the acceptance.

This is also the effect of the case of Eliason *v.* Henshaw (4 Wheat. 228) in this court, though the point was not necessarily involved in the decision of the case. The acceptance there had not been according to the terms of the bargain proposed, for which reason the plaintiff failed.

II. The next position against the claim is the nonpayment of the premium. * * *

Decree reversed.

Editor's Note.—"The mere determination to accept an offer does not constitute an acceptance which is binding on the parties. The assent must either be communicated to the other party or some act must have been done which the other party has expressly or impliedly offered to treat as a communication. Where parties are

Acceptance must not vary from terms of offer

JENNESS *v.* MT. HOPE IRON CO.,

53 Maine 20 (1864).

Case submitted to Supreme Court for opinion. Assumpsit for alleged breach of contract.

WALTON, J.: The negotiation was carried on by letters as follows:

Plaintiff—October 20, 1862, "What will you sell me kegs of nails for, delivered at Bangor, in the course of a month, cash down?"

Defendants—October 23, 1862, "We will sell you 450 casks common assorted nails, delivered on the dock at Bangor at $3.62 per keg of 100 lbs. each, cash."

Plaintiff—October 27, 1862, "Nails have advanced so much I am almost afraid to buy, but you will send me as soon as possible, 303 kegs (naming the kinds), and I will send you a check on Exchange Bank of Boston."

Plaintiff—November 11, 1862, "Not having heard whether you have shipped the nails ordered, I thought I would write you as we shall have but a few weeks more of navigation."

Defendants—November 14, 1862, "It will not be possible for us to get out the nails you have ordered this month, as previous orders must take precedence. It is next to impossible for us to get out nails enough to supply our back orders, and we thought it best to write you, as navigation may be closed too soon for us to forward them this fall. We will, however, do our best to satisfy all our customers, and your order shall receive attention when we get to it."

This is the whole substances of the written correspondence between these parties, and we look in vain to find in it evidence of a contract *completed;* a proposition by one party, accepted without modification by the other. The defendants offered to deliver 450 casks at $3.62 per cask; but

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distant from each other and the contract is to be made by correspondence, the writing of a letter or telegram containing a notice of acceptance, is not of itself sufficient to complete the contract. In such a case the act must involve an irrevocable element and the letter must be placed in the mail or the telegram deposited in the office for transmission, and thus placed beyond the power or control of the sender before the assent becomes effectual to consummate a contract, and not then unless the offer is still standing.—Troutsline & Co. *v.* Sellers, 35 Kan. 447.

A United States mail box at a street corner, or a mail chute, is a post-office within the meaning of the above cases.—Wood *v.* Callaghan, 61 Mich. 402.

this offer was not accepted by the plaintiff; and his offer for 303 casks does not appear to have been accepted by the defendants. We look in vain for a distinct proposition by either party, which is accepted without modification by the other. To constitute a contract, there must be a proposition by one party, accepted by the other without any modification whatever. If the acceptance modifies the proposition in any particular, however trifling, it amounts to no more than a counter proposition. It is not in law an acceptance which will complete the contract. The letters between these parties failed therefore to establish a *prima facie* case for the plaintiff.

Non-suit ordered.

Acceptance by act

DAY *v.* CATON,

119 Mass. 513 (1875).

Appeal from a judgment for plaintiff.

Action on a contract to recover value of one-half of brick party wall built by the plaintiff upon and between the adjoining estates 27 and 29 Greenwich Park, Boston. * * * The plaintiff had an equitable interest in lot 29. The plaintiff testified that there was an express agreement on the defendant's part to pay him one-half the value of the wall when the defendant should use it in building upon lot 27. The defendant denied this, and testified that he never had any conversation with the plaintiff about the wall; and there was no other direct testimony on this point. The judge instructed the jury as follows: "A promise would not be implied from the fact that the plaintiff with the defendant's knowledge built the wall, and the defendant used it, but it might be implied from the conduct of the parties. If the jury find that the plaintiff undertook and completed the

building of the wall with the expectation that the defendant would pay him for it, and the defendant had reason to know that the plaintiff was so acting with that expectation, and allowed him so to act without objection, then the jury might infer a promise on the part of the defendant to pay the plaintiff." The jury found for the plaintiff. The defendant excepted.

DEVENS, J.: The ruling that a promise to pay for the wall would not be implied from the fact that the plaintiff with the defendant's knowledge, built the wall, and that the defendant used it, is conceded to have been correct. * * * The fact that the plaintiff expected to be paid for the work would certainly not be sufficient of itself to establish the existence of a contract, when the question between the parties was whether one was made. Taft *v.* Dickinson, 6 Allen 553. It must be shown that, in some manner, the party sought to be charged assented to it. If a party, however, voluntarily accepts and avails himself of valuable services rendered for his benefit, when he has the option whether to accept or reject them, even if there is no distinct proof that they were rendered by his authority of request, a promise to pay for them may be inferred. His knowledge that they were valuable and his exercise of the option to avail himself of them, justified this inference. Abbott *v.* Herman, 7 Greenl. 118, and when one stands by in silence and sees valuable services rendered upon his real estate by the erection of a structure (of which he must necessarily avail himself afterwards in his proper use thereof), such silence, accompanied with the knowledge on his part that the party rendering the services expects payment therefor, may fairly be treated as evidence of an acceptance of it, and as tending to show an agreement to pay for it. The maxim, *Qui tacet consentire videtur,* is to be construed indeed as applying only to those cases where the circumstances are such that a party is fairly called upon either to deny or admit his liability. But if silence may be interpreted as assent where a proposition is made to one

which he is bound to deny or admit, so also it may be if he is silent in the face of facts which fairly call upon him to speak. Lamb *v.* Bunce, 4 M. & S. 275. If a person saw day after day a laborer at work in his field doing services, which must of necessity inure to his benefit, knowing that the laborer expected pay for his work, when it was perfectly easy to notify him if his services were not wanted, even if a request were not expressly proved, such a request either previous to or contemporaneous with the performance of the services, might fairly be inferred. But if the fact was merely brought to his attention upon a single occasion, and casually, if he had little opportunity to notify the other that he did not desire the work, and should not pay for it, or could only do so at the expense of much time and trouble, the same inference might not be made. The circumstances of each case would necessarily determine whether silence with a knowledge that another was doing valuable work for his benefit, and with the expectation of payment, indicated that consent which would give rise to the inference of a contract. The question would be one for the jury, and to them it was properly submitted in the case before us by the presiding judge.

Exceptions overruled.

Right to revoke an offer before acceptance

FISHER *v.* SELTZER,

23 Pa. 308 (1854).

Appeal by plaintiff from judgment for plaintiff.

Action by Fisher, late sheriff, to recover from Seltzer the difference between the amount bid at a sale of property and the amount realized at a second sale, with costs, etc. The sheriff, before the sale, had prescribed certain rules or conditions, among which were that "no person

shall retract his or her bid," and that if a bidder failed to comply with all conditions of the sale, "he shall pay all costs and charges." At the sale Seltzer bid seven thousand dollars, under the belief that the property was to be sold free of a certain mortgage for six thousand dollars. Discovering his error, he retracted his bid before it was accepted, but the sheriff, denying this right of retraction, knocked down the property to him. He refused to take it. On a resale it brought only one thousand five hundred dollars. Judgment was entered for plaintiff for the costs of the second sale only. Plaintiff prosecuted a writ of error.

LEWIS, J.: Mutuality is so essential to the validity of contracts not under seal, that they cannot exist without it. A bid at auction, before the hammer falls, is like an offer before acceptance. In such a case there is no contract, and the bid may be withdrawn without liability or injury to any one. The brief interval between the bid and its acceptance is the reasonable time which the law allows for inquiry, consideration, correction of mistakes, and retraction. This privilege is of vital importance in sheriff's sales, where the rule of *caveat emptor* operates with all its vigor. It is necessary, in order that bidders may not be entrapped into liabilities never intended. Without it, prudent persons would be discouraged from attending these sales. It is the policy of the law to promote competition, and thus to produce the highest and best price which can be obtained. The interests of debtors and creditors are thus promoted. By the opposite course, a creditor might occasionally gain an advantage, but an innocent man would suffer unjustly, and the general result would be disastrous. A bidder at sheriff's sale has a right to withdraw his bid at any time before the property is struck down to him, and the sheriff has no authority to prescribe conditions which deprive him of that right. Where the bid is thus withdrawn before acceptance, there is no contract, and such a bidder cannot, in any sense, be regarded as a "purchaser." He is, therefore, not liable for "the costs and charges" of

a second sale. Where there has been no sale, there can be no resale.

The judgment ought not to have been in favor of the plaintiff, even for "the costs and charges" of the second sale; but as the defendant does not complain, we do not disturb it.

Judgment affirmed.

Effect of option on right to revoke offer

COLEMAN *v.* APPLEGARTH,

68 Md. 21 (1887).

Appeal from decree dismissing bill in equity.

ALVEY, C. J. Coleman, the appellant, filed his bill against Applegarth and Bradley, the appellees, for a specific performance of what is alleged to be a contract made by Applegarth with Coleman for the sale of a lot of ground in the city of Baltimore. The contract upon which the application is made, and which is sought to be specifically enforced, reads thus:

> "For and in consideration of the sum of five dollars, paid me, I do hereby give to Charles Coleman the option of purchasing my lot of ground, northwest corner, etc., assigned to me by Wright and McDermot, by deed dated, etc., subject to the ground rent therein mentioned, at and for the sum of $645 cash, at any time on or before the first day of November, 1886."

It was dated the 3d of September, 1886, and signed by Applegarth alone.

The plaintiff, Coleman, did not exercise his option to purchase within the time specified in the contract; but he alleges in his bill that Applegarth, after making the contract of the 3d of September, 1886, and before the expiration of the time limited for the exercise of the option, verbally agreed with the plaintiff to extend the time for the exercise of such option to the 1st of December, 1886. It is fur-

ther alleged that, about the 9th of November, 1886, without notice to the plaintiff, Applegarth sold, and assigned by deed, the lot of ground to Bradley, for the consideration of $700; and that subsequently, but prior to the 1st of December, 1886, the plaintiff tendered to Applegarth, in lawful money, the sum of $645, and demanded a deed of assignment of the lot of ground, but which was refused. It is also charged that Bradley had notice of the optional right of the plaintiff at the time of taking the deed of assignment from Applegarth, and that such deed was made in fraud of the rights of the plaintiff under the contract of September 3, 1886. The relief prayed is that the deed to Bradley may be declared void, and that Applegarth may be decreed to convey the lot of ground to the plaintiff upon payment by the latter of the $645, and for general relief.

The defendants, both Applegarth and Bradley, by their answers, deny that there was any binding contract, or optional right existing in regard to the sale of the lot, as between Applegarth and the plaintiff, at the time of the sale and transfer of the lot to Bradley; and the latter denies all notice of the alleged agreement for the extension of time for the exercise of the option by the plaintiff; and both defendants rely upon the statute of frauds as a defense to the relief prayed.

The plaintiff was examined as a witness in his own behalf, and he also called and examined both of the defendants as witnesses in support of the allegation of his bill But without special reference to the proof taken, the questions that are decisive of the case may be determined upon the facts as alleged by the bill alone, in connection with the contract exhibited, as upon demurrer; such facts being considered in reference to the grounds of defense interposed by the defendants.

The contract set up is not one of sale and purchase, but simply for the option to purchase within a specified time, and for a given price. It was unilateral and binding upon one party only. There was no mutuality in it, and it was

binding upon Applegarth only for the time stipulated for the exercise of the option. After the lapse of the time given, there was nothing to bind him to accept the price and convey the property; and the fact that this unilateral agreement was reduced to writing added nothing to give it force or operative effect beyond the time therein limited for the exercise of the option by the plaintiff. * * * Here, time was of the very essence of the agreement, the nominal consideration being paid to the owner for holding the property for the specified time, subject to the right of the plaintiff to exercise his option whether he would buy it or not. When the time limited expired, the contract was at an end, and the right of option gone, if that right has not been extended by some valid binding agreement that can be enforced. This would seem to be the plain dictate of reason, upon the terms and nature of the contract itself; and that is the plain result of the decision of this court, made in respect to an optional contract to purchase, in the case of Maughlin *v.* Perry, 35 Md. 352.

As must be observed, it is not alleged or pretended that the plaintiff attempted to exercise his option, and to complete a contract of purchase, within the time limited by the written agreement of the 3d of September, 1886. But it is alleged and shown that before the expiration of such time, the defendant Applegarth, verbally agreed or promised to extend the time for the exercise of the option by the plaintiff from the 1st of November to the 1st of December, 1886; and that it was within this latter or extended period and after the property had been sold and conveyed to Bradley, that the plaintiff proffered himself ready to accept the property and pay the price therefor. It is quite clear, however, that such offer to accept the property came too late. There was no consideration for the verbal promise or agreement to extend the time, and such promise was a mere *nudum pactum,* and therefore not enforceable, to say nothing of the statute of frauds, which has been invoked by the defendants. After the 1st of November, 1886, the

verbal agreement of Applegarth operated simply as a mere continuing offer at the price previously fixed, and which offer only continued until it should be withdrawn or otherwise ended by some act of his; but he was entirely at liberty at any time, before acceptance, to withdraw the offer; and the subsequent sale and transfer of the property to Bradley had the effect at once of terminating the offer to the plaintiff.

The principles that govern in cases like the present are very fully and clearly stated by the English court of appeal in chancery in the case of Dickinson *v.* Dodds, 2 Ch. Div. 463. That case, in several of its features, is not unlike the present. There the owner of property signed a document which purported to be an agreement to sell it at a fixed price, but added a postscript, which he also signed, in these words: "This offer to be left over until Friday, nine o'clock A. M.," two days from the date of the agreement. Upon application of the party, who claimed to be vendee of the property, for specific performance, it was held, upon full and careful consideration by the court of appeal, that the document amounted only to an offer, which might be withdrawn at any time before acceptance, and that a sale to a third person which came to the knowledge of the person to whom the offer was made was an effectual withdrawal of the offer. In the course of his judgment, after declaring the written document to be nothing more than an offer to sell at a fixed price, Lord Justice James said:

"There was no consideration given for the undertaking or promise to whatever extent it may be considered binding, to keep the property unsold until nine o'clock on Friday morning; but apparently Dickinson was of opinion, and probably Dodds was of the same opinion, that he (Dodds) was bound by that promise, and could not in any way withdraw from it, or retract it, until nine o'clock on Friday morning, and this probably explains a good deal of what afterwards took place. But it is clear, settled law,

on one of the clearest principles of law, that this promise being a mere *nudum pactum,* was not binding, and that at any moment before complete acceptance by Dickinson of the offer, Dodds was as free as Dickinson himself. That being the state of things, it is said that the only mode in which Dodds could assert that freedom was by actually and distinctly saying to Dickinson, 'Now I withdraw my offer.' It appears to me that there is neither principle nor authority for the proposition that there must be an express and actual withdrawal of the offer, or what it called a retraction. It must, to constitute a contract, appear that the two minds were at one, at the same moment of time, that is, that there was an offer continuing up to the time of the acceptance. If there was not such a continuing offer, then the acceptance comes to nothing."

And Lord Justice Mellish was quite as explicit in stating his judgment, in the course of which he said:

"He was not in point of law bound to hold the offer over until nine o'clock on Friday morning. He was not so bound either in law or in equity. Well, that being so, when on the next day he made an agreement with Allan to sell the property to him, I am not aware of any ground on which it can be said that that contract with Allan was not as good and binding a contract as ever was made. Assuming Allan to have known (there is some dispute about it and Allan does not admit that he knew it, but I will assume that he did) that Dodds made the offer to Dickinson, and had given him until Friday morning at nine o'clock to accept it, still, in point of law, that could not prevent Allan from making a more favorable offer than Dickinson, and entering at once into a binding agreement with Dodds."

And further on he says:

"If the rule of law is that a mere offer to sell property, which can be withdrawn at any time, and which is made dependent on the acceptance of the person to whom it is made, is a mere *nudum pactum,* how is it possible that

the person to whom the offer has been made can by acceptance make a binding contract after he knows that the person who has made the offer has sold the property to some one else? It is admitted law that if a man who makes an offer dies, the offer cannot be accepted after he is dead, and parting with the property has very much the same effect as the death of the owner, for it makes the performance of the offer impossible. I am clearly of opinion that, just as when a man who has made an offer dies before it is accepted it is impossible that it can then be accepted, so when one of the persons to whom the offer was made knows that the property has been sold to someone else, it is too late for him to accept the offer; and on that ground I am clearly of opinion that there was no binding contract for the sale of this property by Dodds to Dickinson."

In this case, the plaintiff admits that, at the time he proffered to Applegarth acceptance of the previous offer to sell at the price named, he was aware of the fact that the property had been sold to Bradley. It was, therefore, too late for him to attempt to accept the offer, and there was not, and could not be made by such proffered acceptance, any binding contract of sale of the property.

It follows that the decree of the court below, dismissing the bill of the plaintiff, must be affirmed.

Editor's Note.—The plaintiffs, the owners of a distillery, and defendant signed a paper in which the plaintiffs agreed that the defendant might purchase the distillery during the year 1871 for $5000, defendant agreeing that he would pay plaintiffs $1000 if he did not buy during the year for the privilege. The court said: "It is not a bargain and sale of the property at $5000, but a proposition and obligation on the part of the plaintiffs, to sell it to the defendant at that price, with the privilege to him to make the purchase or not, as he may determine within the year. For this option which was a valuable privilege, he agrees to pay the $1000 in the event of his declining to make the purchase. The defendant acquired the right under the contract to purchase the property for the proposed price. The plaintiffs had obligated themselves to sell at that price; but defendant was under no obligation to buy. He merely bound himself to pay the $1000 for the privilege of buying, and in case he did not buy, it was entirely optional with the defendants to purchase the property or let it alone; whilst the plaintiffs had abandoned the right to make sale to anyone else during the year."—Grebenhorst *v.* Nicodemus, 42 Md. 236.

Necessity for communication of revocation of offer

BRAUER *v.* SHAW,

168 Mass. 198 (1897).

Two actions of contract for the alleged breach of two contracts. The lower court ruled that the plaintiffs were not entitled to recover in either action and directed the jury to return a verdict for the defendants in each case. The plaintiffs excepted and appealed.

HOLMES, J.: The two actions are based on alleged contracts letting all the cattle carrying space on the Warren Line of steamships for the May sailing from Boston to Liverpool, the first contract at the rate of 50s. per head; the second, an alternative one, at 52s. 6d. per head.

[The court was of the opinion that for one reason or another the right to compensation upon the first contract was not made out.]

We come then to the later telegrams of the same day which are relied upon as making the second contract. At half-past eleven the defendant telegraphed, "Subject prompt reply, will let you May space, fifty-two six." This was received in New York at sixteen minutes past twelve, and at twenty-eight minutes past twelve a reply was sent accepting the offer. For some reason this was not received by defendants until twenty minutes past one. At one the defendants telegraphed revoking the offer, the message being received in New York at forty-three minutes past one. The plaintiff held the defendants to their bargain, and both parties stand upon their rights.

There is no doubt that the reply was handed to the telegraph company promptly, and at least, it would have been open to a jury to find that the plaintiffs had done all that was necessary on their part to complete the contract. If, then, the offer was outstanding when it was accepted, the contract was made. But the offer was outstanding. At the time when the acceptance was received, even the revocation of the offer had not been received. It seems to us a rea-

sonable requirement, that to disable the plaintiffs from accepting their offer, the defendants should bring home to them actual notice that it had been revoked. By their choice and act, they brought about a relation between themselves and the plaintiffs, which the plaintiffs could turn into a contract by an act on their part, and authorize the plaintiffs to understand and to assume that that relation existed. When the plaintiffs acted in good faith on the assumption, the defendants could not complain. Knowingly to lead a person reasonably to suppose, that you offer, and to offer, are the same thing. O'Donnell *v.* Clinton, 145 Mass. 461. The offer must be made before the acceptance, and it does not matter whether it is made a longer or a shorter time before, if, by its express or implied terms, it is outstanding at the time of the acceptance. Whether much or little time has intervened, it reaches forward to the moment of acceptance, and speaks then. It would be monstrous to allow an inconsistent act of the offerer, not known or brought to the notice of the offeree, to affect the making of the contract; for instance, a sale by an agent elsewhere one minute after the principal personally has offered goods which are accepted within five minutes by the person to whom he is speaking. The principle is the same when the time is longer, and the act relied on a step looking to, but not yet giving notice.

Exceptions sustained.

Editor's Note.—The offer may be withdrawn and the withdrawal thereof is effectual so soon as the notice thereof reaches the other party, but if before that time the offer is accepted, the party making the offer is bound and the withdrawal thereafter is too late. In this case it appears the defendant's letter of withdrawal was sent on the same day on which the notice of the plaintiff's acceptance of their previous offer was transmitted and it has been argued that the onus is on the plaintiff to show that the sending of the acceptance preceded the sending of the letter of withdrawal. This position is not clear; it is quite immaterial to inquire whether the defendant's letter or the plaintiff's draft was first sent.

Until the notice of the withdrawal of the offer actually reached the plaintiff the offer was continuing and the acceptance thereof completed the contract.—Wheat et al. *v.* Cross, 31 Md. 99.

"While an acceptance is complete where a letter is deposited in the mail, a retraction of an offer can have no effect until it is

Offer must be accepted within reasonable time

AVERILL ET AL. *v.* HEDGES,

12 Conn. 424 (1838).

Motion by plaintiffs for new trial after verdict for defendant.

This was an action of assumpsit. On February 29, 1836, Averill, residing at Hartford, Conn., inquired by letter of John Thomas, agent for Washington Iron Co., at Wareham, Mass., upon what terms he could supply Averill with a quantity of iron of certain descriptions. On March 2 Thomas replied, specifying the terms on which he would furnish the articles in question. On the 14th of March Averill wrote to Thomas on other business, but took no notice of the offer made in Thomas' first letter. On the 16th Thomas replied, and, at the close of his letter, inquired of Averill whether he accepted his proposal regarding the iron. This letter arrived at Hartford on the 18th of March, about two o'clock P. M. In a letter dated the 19th, but not put into the post office until the 20th, Averill accepted Thomas' proposal. There was no direct mail to Wareham going out on the 20th, which was Sunday. The letter was not actually sent until the morning of the 21st, and it reached Thomas with another letter from Averill dated the 21st on the 23rd. Previous to this Thomas had disposed of the iron, and could not comply with Averill's order. On the 19th there was a direct mail to Wareham, leaving Hartford between five and six o'clock A. M., by which a letter would reach Wareham next day.

VISSEL, J.: The great question in the case is whether, upon the facts, there has been an acceptance of the defendant's offer, so that he is bound by it. * * *

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communicated to the person to whom the offer is made and the revocation can take effect only if it is communicated to the other party before its acceptance. An offer to contract communicated by post must be considered as continually made until it reaches the other party. If he accepts before knowledge of a retraction of the offer the contract is binding."—Brunner Co. *v.* Standard Lumber Co., 63 Pa. Sup. 283, 290.

It is very immaterial when the letter of acceptance of the plaintiff was written; until sent it was entirely in their power and under their control, and was no more an acceptance of the defendant's offer than a bare determination, locked up in their own bosoms, and uncommunicated, would have been. And it surely will not be claimed that mere volitions, a mere determination to accept a proposal, constituted a contract. The plaintiffs, then did not accept the defendant's proposition until the 20th, and, for aught that appears, until the evening of that day. That they were bound to accept, within a reasonable time, was distinctly admitted in the argument; and if not admitted, the position is undeniable. The case of the plaintiffs, then, comes to this, and this is the precise ground of their claim; that they had a right to hold the defendant's offer under advisement for more than 48 hours, and to await the arrival of three mails from New York, advising them of the state of the commodity in the market; and having then determined to accept, the defendant was bound by his offer; and that this constitutes a valid mercantile contract. Now, in regard to such a claim, we can only say that it appears to us to be in the highest degree unreasonable; and that we know of no principle, of no authority, from which it deserves the slightest support.

Indeed, it seems to us to be subversive of the whole law of contracts. However, it is most obvious that if, during the interval, the defendant was bound by his offer, there was entire want of mutuality; the one party was bound, while the other was not. Had a proposition been made at a personal interview between the parties, there can be no pretense that it would have bound the defendant beyond the termination of the interview. * * * Thus in the case of Adams *v.* Lindsell, 1 B. & A. 681, there was an offer to sell goods on certain specified terms, provided an acceptance of the offer was signified by return mail. This was done; and it was held (the defendant not having retracted his offer in the meantime), that the contract was complete. It is

not easy to reconcile this decision with that of Cookes *v.* Oxley (3 T. Rep. 653) unless it can be distinguished on the ground that, as the offer was made through the mail, the party is to be considered as repeating the offer at every moment until the other party has had an opportunity of manifesting his acceptance. And this seems to have been the ground on which the case was placed by the Court of King's Bench. They say: "If the defendants were not bound by their offer, when accepted by the plaintiffs, till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendant had received their answer and was bound by it; and so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of time a letter was traveling, the same identical offer to the plaintiffs; and then the contract is completed by the acceptance of it by the latter."

The case of Adams *v.* Lindsell is regarded as an authority, and followed by the Supreme Court of Errors of the State of New York in Mactier *v.* Frith, 6 Wend. 103. And there the doctrine is asserted that the acceptance of an offer, made through the medium of a letter, binds the bargain, if the party making the offer has not in the meantime revoked it. In this case, which goes as far as any of the cases on this subject, the rule is laid down that the offer continues until the letter containing it is received, and the party has had fair opportunity to answer it. And it is further said, that a letter written would not be an acceptance, so long as it remained in the possession or under the control of the writer. An offer, then, made through a letter is not continued beyond the time that the party has a "fair opportunity" to answer it. Once establish the principle that a party to whom an offer is made may hold it under consideration more than 48 hours, watching in the meantime the fluctuations of the market, and then bind the other party by his acceptance, and it is plain that you create a shock through the commercial community, utterly destruc-

tive of all mercantile confidence. No offers would be made by letter. It would be unsafe to make them.

New trial refused.

Lapse—Failure to accept in manner prescribed

ELIASON ET AL. *v.* HENSHAW,

4 Wheaton (U. S.) 225 (1819).

Appeal from judgment for plaintiff (Henshaw).

WASHINGTON, J.: This is an action, brought by the plaintiff, to recover damages for the non-performance of the agreement, alleged to have been entered into by the defendant, for the purchase of a quantity of flour, at a stipulated price. The evidence of this contract, given in the court below, is stated in a bill of exceptions, and is to the following effect:

A letter from the defendants to the plaintiff, dated the 10th of February, 1813, in which they say: "Capt. Conn informs us that you have a quantity of flour to dispose of.

Editor's Note.—When a letter containing an offer requires an answer by return mail, the acceptance must be sent by the next post. If the offer does not specify the time, the acceptance must be within a reasonable time, or the offer will lapse.

When the parties are dealing with regard to a mercantile commodity the price of which in the market changes from day to day, and the party who receives the offer does not post his acceptance during the same business day, he cannot take advantage of a rise in the market price, and accept upon some other business day. What in any case is reasonable time must be dependent upon the situation of the parties, and the subject matter of the negotiations.

What is a reasonable time for acceptance is a question of law for the court in such commercial transactions as happen in the same way, day after day, and present the question upon the same data in continually regarding instances, and where the time taken is so clearly reasonable or unreasonable that there can be no question of doubt as to the proper answer to the question. When the answer to the question is one dependent on many different circumstances, which do not continually recur in other cases of like character, and with respect to which no certain rule of law could be laid down, the question is one of fact for the jury.—Boyd *v.* Peanut Co., 25 Pa. S. C. 199.

We are in the practice of purchasing flour at all times, in Georgetown, and will be glad to serve you, either in receiving your flour in store when the markets are dull, and disposing of it when the markets will answer to advantage, or we will purchase at market price when delivered; if you are disposed to engage two or three hundred barrels at present, we will give you $9.50 per barrel, deliverable the first water, in Georgetown, or any service we can. If you should want an advance, please write us by mail, and will send you part of the money in advance." In a postscript they add: "Please write by return of wagon whether you accept our offer." This letter was sent from the house at which the writer then was, about two miles from Harper's Ferry, to the plaintiff at his mill, at Mill Creek, distant about twenty miles from Harper's Ferry, by a wagoner then employed by the plaintiff to haul flour from his mill to Harper's Ferry, and then about to return home with his wagon. He delivered the letter to the plaintiff on the 14th of the same month, to which an answer, dated the succeeding day, was written by the plaintiff, addressed to the defendants, at Georgetown, and dispatched by a mail which left Mill Creek on the 19th, being the first regular mail from that place to Georgetown. In this letter the writer says: "Your favor of the 10th inst. was handed me by Mr. Chenoweth last evening. I take the earliest opportunity to answer it by post. Your proposal to engage 300 barrels of flour, delivered in Georgetown, by the first water, at $9.50 per barrel, I accept; shall send on the flour by the first boats that pass down from where my flour is stored on the river; as to any advance, will be unnecessary—payment on delivery is all that is required."

On the 25th of the same month the defendants addressed to the plaintiff an answer to the above, dated at Georgetown, in which they acknowledge the receipt of it, and add: "Not having heard from you before, had quite given over the expectation of getting your flour, more particularly as we requested an answer by return of wagon the next day,

and, as we did not get it, had bought all we wanted." The wagoner, by whom the defendants' first letter was sent, informed them, when he received it, that he should not probably return to Harper's Ferry, and he did not, in fact, return in the plaintiff's employ. The flour was sent down to Georgetown some time in March, and the delivery of it to the defendants was regularly tendered and refused.

Upon this evidence the defendants moved the court below to instruct the jury that if they believed the said evidence to be true, as stated, the plaintiff in this action was not entitled to recover the amount of the price of the 300 barrels of flour, at the rate of $9.50 per barrel. The court being divided in opinion, the instruction prayed for was not given. The question is, whether the court below ought to have given the instruction to the jury as the same was prayed for? If they ought, the judgment, which was in favor of the plaintiff in that court, must be reversed.

It is an undeniable principle of the law of contracts that an offer of a bargain, by one person to another, imposes no obligation upon the former until it is accepted by the latter, according to the terms in which the offer was made. Any qualification of, or departure from, those terms invalidates the offer, unless the same be agreed to by the person who made it. Until the terms of the agreement have received the assent of both parties, the negotiation is open, and imposes no obligation upon either.

In this case the defendants offered to purchase from the plaintiff two or three hundred barrels of flour, to be delivered at Georgetown, by the first water, and to pay for the same $9.50 per barrel. To the letter containing this offer they required an answer by the return of the wagon, by which the letter was dispatched. This wagon was at that time in the service of the plaintiff, and employed by him in hauling flour from his mill to Harper's Ferry, near to which place the defendants then were. The meaning of the writers was obvious. They could easily calculate, by the usual length of time which was employed by this

wagon in traveling from Harper's Ferry to Mill Creek and back again with a load of flour, about what time they should receive the desired answer, and therefore it was entirely unimportant whether it was sent by that or another wagon, or in any other manner, provided it was sent to Harper's Ferry, and was not delayed beyond the time which was ordinarily employed by wagons engaged in hauling flour from the plaintiff's mill to Harper's Ferry. Whatever uncertainty there might have been as to the time when the answer would be received, there was none as to the place to which it was to be sent; this was distinctly indicated by the mode pointed out for the conveyance of the answer. The place, therefore, to which the answer was to be sent, constituted an essential part of the defendants' offer.

It appears, however, from the bill of exceptions, that no answer to this letter was at any time sent to the defendants at Harper's Ferry. Their offer, it is true, was accepted by the terms of a letter addressed Georgetown, and received by the defendants at that place; but an acceptance communicated at a place different from that pointed out by the defendants, and forming a part of their proposal, imposed no obligation binding upon them, unless they had acquiesced in it, which they declined doing. It is no argument that an answer was received at Georgetown; the defendants had a right to dictate the terms upon which they would purchase the flour, and unless they were complied with, they were not bound by them. All their arrangements may have been made with a view to the circumstances of place, and they were the only judges of its importance. There was, therefore, no contract concluded between these parties, and the Court ought, therefore, to have given the instruction to the jury which was asked for.

Judgment reversed and new trial ordered.

Editor's Note.—Where an offer is sent my mail, a reply accepting the offer sent by telegram or other means equally expeditious with the mails if received by the offerer would effect a contract. Where the offer is by advertisement an acceptance by post is not communicated until the letter of acceptance actually reaches the offerer.—Haldane *v.* U. S., 69 Fed. 819.

Lapse—Passage of time

LONGWORTH ET AL., EXECUTORS, *v.* MITCHELL, 26 Ohio 334 (1875).

Appeal from decree entered in favor of plaintiff (Mitchell).

Nicholas Longworth leased a certain lot in the city of Cincinnati to the plaintiff, Mitchell, for a term of fourteen years. The lease also contained a provision that Mitchell might purchase at any time during the first seven years of occupancy at the rate of $250 per front foot, or at any time within the last seven years at the rate of $300 per front foot. Just before the close of the first period, Mitchell elected to become the purchaser of the lot, and tendered to the executors of Longworth $250 per front foot, and demanded a deed. The executor refused to make deed on the ground, among others, that prior to the time when Mitchell tendered the sum stipulated they, the executors, were negotiating for the sale of the lot to the C. & I. R. R. Co. They alleged that Mitchell was aware of this negotiation, and had agreed with the executors that he would surrender his lease to them if they would pay him $2,000, and gave them two weeks in which to accept and comply with the offer. There was a conflict of evidence at the trial as to whether an offer was made by the executors within the two weeks' period allowed. The court found that the offer was made sixteen days before it was accepted by the executors, and thereupon rendered judgment in favor of Mitchell, ordering a specific execution of the contract.

Among other errors which were assigned as reasons for the reversal of judgment was the following: "The time allowed for acceptance of the offer was not material, and its acceptance two days after the expiration of the two weeks was sufficient."

WELCH, C. J.: The rule frequently adopted in a court of equity, that time is not of the essence of a contract, does not apply, as we understand the law, to a mere offer to make

a contract. The offer rests upon no consideration, and may be withdrawn at any time before acceptance. An offer without time given for its acceptance must be accepted immediately or not at all, and a limitation of time for which a standing offer is to run is equivalent to the withdrawal of the offer at the end of the time named. A standing offer is in the nature of a favor granted to the opposite party, and cannot on any just principle be made available after the time limit has expired.

Judgment affirmed.

Lapse—Death of the offeror

PRATT, ADMX., *v.* BAPTIST SOCIETY,

93 Ill. 475 (1879).

Action on notes. Appeal from judgment for plaintiff (Baptist Society).

The Baptist Society obtained judgment against Mary L. Pratt as administratrix of the estate of P. B. Pratt, on two promissory notes executed by the deceased, one for $300 and the other for $327.50. These notes were given to enable the Baptist Society to purchase a bell. It was shown at the trial that a bell was procured, and probably upon the faith of the notes, but it appears with reasonable certainty that this had been done since Pratt's death. The question raised on appeal was whether Pratt's death revoked the promise expressed in the notes, no money having been expended or labor bestowed or liability of any kind incurred prior to his death upon the faith of that promise.

SCHOLFIELD, J.: The promise stands as a mere offer, and may, by necessary consequence, be revoked at any time before it is acted upon. It is the expending of money, etc., or incurring of legal liability on the faith of the promise, which gives the right of action, and without this there is no right of action. McClure *v.* Wilson, 43 Ill. 356, and cases there cited. Being but an offer, and susceptible of

revocation at any time before being acted upon, it must follow that the death of the promisor, before the offer is acted upon, is a revocation of the offer. This is clearly so upon principle. The subscription or note is held to be a mere offer until acted upon, because until then there is no mutuality. The continuance of an offer is in the nature of its constant repetition, which necessarily requires some one capable of making a repetition. Obviously, this can no more be done by a dead man than a contract can, in the first instance, be made by a dead man.

Judgment reversed.

Offer is made irrevocable by acceptance

HICKEY *v.* O'BRIEN,
123 Mich. 611 (1900).

Appeal from a judgment for plaintiff. Action of replevin.

MONTGOMERY, C. J.: In 1895, Kreutzberger & Crabbe were engaged in the business of furnishing ice to their customers in Saginaw. John F. Lucas & Co. were also engaged in the ice business, and had equipment and conveniences for putting up ice in large quantities. On the 1st of March, 1895, a contract, to which John F. Lucas & Co. were designated as parties of the first part and Kreutzberger & Crabbe were parties of the second part, was executed by the parties. Its material provisions were as follows:

"In consideration of the covenants and conditions hereinafter mentioned, first parties hereby agree to furnish second parties with all the ice that they may require to carry on their ice business in said city for the period of five years from and after March 1, 1895, at the rate of seventy-five ($.75) cents per ton, to be paid for monthly from and after June 1, 1895.

"Second parties hereby agree to purchase from first parties all the ice necessary to carry on their ice business in said city for the period of five years from and after March 1, 1895, and to pay first parties therefor the sum of seventy-five ($.75) cents per ton, to be paid monthly from and after June 1, 1895." * * *

Kreutzberger & Crabbe continued to conduct the ice business until about December 19, 1896, when plaintiff claims to have purchased the property of the firm of Mr. Crabbe. John F. Lucas & Co. brought an action against Kreutzberger & Crabbe to recover damages for the breach of the contract on their part, instituting proceedings by attachment on the property which was transferred to plaintiff by Crabbe. The defendant O'Brien is a deputy sheriff, and seized the property by virtue of the attachment. This action is replevin for the property so seized. On the trial it was conceded that Kreutzberger & Crabbe had paid Lucas & Co. for all ice actually delivered, and that the claimed indebtedness named in the attachment suit was for damages for the breach of their contract to take ice at the price stipulated.

The instruction of the court below was based on a view that the contract did not bind Kreutzberger & Crabbe to take ice for any stated time. If the circuit judge was right in this, the other questions in the case appear to us of little moment; for, if the contract be so construed, there is no indebtedness to Lucas & Co. to support the attachment, and they were not, therefore, in a position to question the *bona fides* of the transaction. If, on the other hand, the contract bound Kreutzberger & Crabbe to take ice at the fixed price for five years, it can scarcely be claimed that the instruction of the court below was correct. The cases which deal with contracts to supply goods to answer the needs of business are not in entire harmony. In Bailey *v.* Austrian, 19 Minn. 535, it was held that a contract to supply plaintiffs with all the pig iron wanted by them until a certain date was *nudum pactum;* as plaintiffs did not engage to *want* any quantity whatever. A similar holding was made in Iowa in the case of Drake *v.* Vorse, 52 Iowa 417 (3 N. W. 465). In Cooper *v.* Wheel Co., 94 Mich. 272 (54 N. W. 39, 34 Am. St. Rep. 341), we had occasion to consider the case of Bailey *v.* Austrian, but did not in terms decide whether such engagement bound the orderer to take any particular quantity. In National Furnace Co. *v.*

Keystone Manfg. Co., 110 Ill. 427, the case of Bailey *v.* Austrian is considered as to its bearing on the question here involved. The Court points out that in the Bailey case stress is laid on the word "want." In the Illinois case cited, the plaintiff agreed to sell to the defendant all the iron needed in its business during the three ensuing years at $22.35 per ton. The defendant agreed to take its year's supply at that price. The Court said:

"We do not regard the contract void on the ground stated. It is true that appellee was only bound by the contract to accept of appellant the amount of iron it *needed* for use in its business; but a reasonable construction must be placed on this part of the contract, in view of the situation of the parties. Appellee was engaged in a large manufacturing business, necessarily using a large quantity of iron in the transaction of its business. It is not to be presumed that appellee would close its business, and need no iron; but, on the contrary, the reasonable presumption would be that the business would be continued, and appellee would necessarily need the quantity of iron which it had been in the habit of using during previous years. It cannot be said that appellee was not bound by the contract. It had no right to purchase iron elsewhere for use in its business. If it had done so, appellant might have maintained an action for a breach of the contract. It was bound by the contract to take of appellant, at the price named, its entire supply of iron for the year; that is, such a quantity of iron, in view of the situation and business of appellee, as was reasonably required and necessary in its manufacturing business."

In the present case, we think the true construction is that Kreutzberger & Crabbe undertook to take ice of Lucas & Co. for the period of five years; that the quantity which they agreed to take was to be measured by the necessities of their business, but that this presupposed that they would have a business for the time agreed.

The judgment will be reversed, and a new trial ordered.

Chapter II

SEAL AND CONSIDERATION

Seal

LORAH *v.* NISSLEY,

156 Pa. 329 (1893).

Appeal from an order opening a judgment. A rule to open judgment was entered on a note alleged to be under seal. The note was in the following form:

MOUNT JOY, PA., August 22, 1881.

"$200.00.

"Five months after date I promise to pay to Jacob E. Lorah, or order, at the First National Bank of Mount Joy, Two Hundred Dollars and without defalcation or stay of execution, value received. And I do hereby confess judgment for the said sum, costs of suit, and release of all errors, waving inquisition and confess condemnation of real estate. And I do further waive all exemption laws, and agree that the same may be levied by attachment upon wages for labor or otherwise.

"Witness: "HENRY B. NISSLEY, Seal.

"GEORGE SHIERS. "Seal."

The word "seal" following the signature of the maker was printed. The court held that the note was not under seal, and permitted the defendant to plead the statute of limitations.

MITCHELL, C. J.: The days of actual sealing of legal documents, in its original sense of the impression of an individual mark or device upon wax or wafer, or even on the parchment or paper itself, have long gone by. It is immaterial what device the impression bears, Alexander *v.* Jameson, 5 Bin. 238, and the same stamp may serve for several parties in the same deed. Not only so, but the use of wax has almost entirely and even of wafers very largely ceased. In short, sealing has become constructive rather than actual, and is in a great degree a matter of intention. It was said more than a century ago in McDill's Lessee *v.* McDill, 1 Dal. 63, that "the signing of a deed is now the

material part of the execution; the seal has become a mere form, and a written or ink seal, as it is called, is good;" and in Long *v.* Ramsay, 1 S. & R. 72, it was said by Tilghman, C. J., that a seal with a flourish of the pen "is not now to be questioned." Any kind of flourish or mark will be sufficient if it be intended as a seal. "The usual mode," said Tilghman, C. J., in Taylor *v.* Glaser, 2 S. & R. 502, "is to make a circular, oval, or square mark, opposite to the name of the signer; but the shape is immaterial." Accordingly it was held in Hacker's Appeal, 121 Pa. 192, that a single horizontal dash, less than an eighth of an inch long, was a sufficient seal, the context and the circumstances showing that it was so intended. On the other hand, in Taylor *v.* Glaser, *supra,* a flourish was held not a seal, because it was put under and apparently intended merely as a part of the signature. So in Duncan *v.* Duncan, 1 Watts 322, a ribbon inserted through slits in the parchment, and thus carefully prepared for sealing, was held not a seal, because the circumstances indicated the intent to use a well-known mode of sealing, by attaching the ribbon to the parchment with wax or wafer, and the intent had not been carried out.

These decisions establish beyond question that any flourish or mark, however irregular or inconsiderable, will be a good seal, if so intended, and *a fortiori* the same result must be produced by writing the word "seal," or the letters "L. S.," meaning originally *locus sigilli;* but now having acquired the popular form of an arbitrary sign for a seal, just as the sign "&" is held and used to mean "and" by thousands who do not recognize it as the Middle Ages' manuscript contraction for the Latin "et."

If, therefore, the word "seal" on the note in suit had been written by Nissley after his name, there could have been no doubt about its efficacy to make a sealed instrument. Does it alter the case any that it was not written by him, but printed beforehand? We cannot see any good reason why it should. Ratification is equivalent to antecedent authority, and the writing of his name to the left of

the printed word, so as to bring the latter into the usual and proper place for a seal, is ample evidence that he adopted the act of the printer in putting it there for a seal. The note itself was a printed form, with blank spaces for the particulars to be filled in, and the use of it raises a conclusive presumption that all parts of it were adopted by the signer, except such as were clearly struck out or intended to be canceled before signing. The pressure of business life and the subdivision of labor in our day have brought into use many things ready-made by wholesale which our ancestors made singly for each occasion, and among others the conveniences of printed blanks for the common forms of written instruments. But even in the early days of the century the act of sealing was commonly done by adoption and ratification rather than as a personal act, as we are told by a very learned and experienced, though eccentric, predecessor, in language that is worth quoting for its quaintness: *"Illi robus et aes triplex.* He was a bold fellow who first in these colonies, and particularly in Pennsylvania, in time whereof the memory of man runneth not to the contrary, substituted the appearance of a seal by the circumflex of a pen, which has been sanctioned by usage and the adjudication of the courts, as *equilpollent* with a stamp containing some effigies or inscription on stone or metal. * * * How could a jury distinguish the hieroglyphic or circumflex of a pen by one man from another? In fact, the circumflex is usually made by the scrivener drawing the instrument, and the word seal inscribed within it." Brackenridge, J., in Alexander *v.* Jameson, 5 Bin. 238, 244.

We are of the opinion that the note in suit was duly sealed.

Order opening judgment reversed and judgment reinstated.

Editor's Note.—In Hacker's Appeal, 121 Pa. 192, one Ellen Waln ended a document by the phrase "I hereunto affix my hand and seal" and signed as follows: "Ellen Waln——" *Held,* that since there was an *expressed intention* of sealing the document, the dash would be construed as a sufficient seal.

CONSIDERATION

Definition of and necessity for consideration

LOUISA W. HAMER, APPELLANT, *v.* FRANKLIN SIDWAY, AS EXECUTOR, ETC., RESPONDENT, 124 N. Y. 538 (1891).

Appeal from judgment for plaintiff.

This action was brought upon an alleged contract.

The plaintiff presented a claim to the executor of William E. Story, Sr., for $5,000 and interest from February 6th, 1875. She acquired it through several *mesne* assignments from William E. Story, second. The claim being rejected by the executor, this action was brought. It appears that William E. Story, Sr., was the uncle of William E. Story, second; that at the celebration of the golden wedding of Samuel Story and wife, father and mother of William E. Story, Sr., on March 20th, 1869, in the presence of the family and invited guests he promised his nephew that if he would refrain from drinking, using tobacco, swearing and playing cards or billiards for money until he became twenty-one years of age he would pay him a sum of $5,000. The nephew assented thereto and fully performed the conditions inducing the promise. When the nephew arrived at the age of twenty-one years, and on January 31, 1875, he wrote to his uncle informing him that he had performed his part of the agreement, and had thereby become entitled to the sum of $5,000. The uncle received the letter, and a few days lated, and on February 6th, he wrote and mailed to his nephew the following letter:

BUFFALO, February 6, 1875.

"W. E. STORY, JR.

"Dear Nephew: Your letter of the 31st ult. came to hand all right, saying that you had lived up to the promise made to me several years ago. I have no doubt but you have, for which you shall have $5000, as I promised you. I had the money in the bank the day you was twenty-one years old that I intend for you, and you shall have the money certain. Now, Willie, I do not intend to interfere with this money in any way till I think you are capable of taking care of it, and the sonner that time comes the better it will

please me. I would hate very much to have you start out in some adventure that you thought all right, and lose this money in one year. * * *

"Truly yours,

"W. E. STORY.

"P. S. You can consider this money on interest."

The nephew received the letter, and thereafter consented that the money should remain with his uncle, in accordance with the terms and conditions of the letters. The uncle died on January 29, 1887, without having paid over to his nephew any portion of the said $5,000 and interest.

PARKER, J.: The question which provoked the most discussion by counsel on this appeal, and which lies at the foundation of plaintiff's asserted right of recovery, is whether by virtue of a contract defendant's testator, William E. Story, became indebted to his nephew, William E. Story, second, on his twenty-first birthday in the sum of $5,000. The trial court found as a fact that "on March 20, 1869, * * * William E Story agreed to and with William E. Story, second, that if he would refrain from drinking liquor, using tobacco, swearing and playing cards or billiards for money until he should become twenty-one years of age, then he, the said William E. Story, would at that time pay him, the said William E. Story, second, the sum of $5,000 for such refraining, to which the said William E. Story, second, agreed," and that he "in all things fully performed his part of said agreement."

The defendant contends that the contract was without consideration to support it, and therefore invalid. He asserts that the promisee by refraining from the use of liquor and tobacco was not harmed, but benefited; that that which he did was best for him to do independently of his uncle's promise, and insists that it follows that unless the promisor was benefited the contract was without consideration. A contention which, if well founded, would seem to leave open for controversy in many cases whether that which the promisee did or omitted to do what in fact, of such benefit to him as to leave no consideration to support the enforce-

ment of the promisor's agreement. Such a rule could not be tolerated, and is without foundation in the law. The Exchequer Chamber in 1875 defined consideration as follows: "A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." Courts "will not ask whether the thing which forms the consideration does, in fact, benefit the promisee or a third party, or is of any substantial value to any one. It is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made as consideration for the promise made to him." (Anson's Prin. of Con. 63.)

"In general a waiver of any legal right at the request of another party is a sufficient consideration for a promise." (Parsons on Contracts, 444.)

"Any damage or suspension or forbearance of a right will be sufficient to sustain a promise." (Kent, Vol. II, 465, 12th ed.)

Pollock, in his work on Contracts, page 166, after citing the definition given by the Exchequer Chamber already quoted, says: "The second branch of this judicial description is really the most important one. Consideration means not so much that one party is profiting as that the other abandons some legal right in the present or limits his legal freedom of action in the future as an inducement for the promise of the first."

Now, applying this rule to the facts before us, the promisee used tobacco, occasionally drank liquor, and he had a legal right to do so. That right he abandoned for a period of years upon the strength of the promise of the testator that for such forbearance he would give him $5,000. We need not speculate on the effort which may have been required to give up the use of those stimulants. It is sufficient that he restricted his lawful freedom of action within certain prescribed limits upon the faith of his uncle's agree-

ment, and now, having fully performed the conditions imposed, it is of no moment whether such performance actually proved a benefit to the promisor and the Court will not inquire into it; but were it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense. Few cases have been found which may be said to be precisely in point, but such as have been support the position we have taken.

The judgment is affirmed, with costs payable out of the estate.

Surrender of right as a consideration

WHITE, EXECUTOR OF JOHN BLUETT, *v.* WILLIAM BLUETT,

23 L. J. R. Exch. N. S. 36 (1853).

Suit was brought upon a promissory note made by the defendant payable to the testator, John Bluett. The defendant pleaded in answer to the plaintiff's claim as follows:

* * * And the defendant saith that the said J. Bluett was the father of the defendant, and that afterward, and after the accruing of the causes of action to which this plea is pleaded, and before this suit, and in the lifetime of the said J. Bluett, the defendant complained to his said father that he, the defendant, had not received at his hands so much money or so many advantages as the other children of the said J. Bluett, and certain controversies arose between the defendant and his said father concerning the premises, and the said J. Bluett afterward admitted and declared to the defendant that his, the defendant's, said complaints were well founded, and therefore, afterward, etc., it was agreed by and between the said J. Bluett and the defendant that the defendant should for-

ever cease to make such complaints, and that in consideration thereof, and in order to do justice to the defendant, and also out of his, the said J. Bluett's natural love and affection toward the defendant, he, the said J. Bluett, would discharge the defendant of and from all liability in respect of the causes of action to which this plea is pleaded, and would accept the said agreement on his, the defendant's part, in full satisfaction and discharge of the said last-mentioned causes of action; and the defendant further saith that afterward, and in the lifetime of the said J. Bluett, and before this suit, he, the said J. Bluett, did accept of and from the defendant the said agreement as aforesaid in full satisfaction and discharge of such mentioned causes of action.

To this plea the plaintiff demurred.

POLLOCK, C. B.: The plea is clearly bad. By the argument a principle is pressed to an absurdity, as a bubble is blown until it bursts. Looking at the words merely, there is some foundation for the argument, and, following the words only, the conclusion may be arrived at. It is said the son had a right to an equal distribution of his father's property, and did complain to his father because he had not an equal share, and said to him, "I will cease to complain if you will not sue upon this note." Whereupon the father said, "If you will promise me not to complain I will give you up the note." If such a plea as this could be supported, the following would be a binding promise: A man might complain that another person used the public highway more than he ought to do, and that other might say, "Do not complain and I will give you £5." It is ridiculous to suppose that such promises could be binding. So, if the holder of a bill of exchange were suing the acceptor, and the acceptor were to complain that the holder had treated him hardly, or that the bill ought never to have been circulated, and the holder were to say, "Now, if you will not make any more complaints I will not sue you." Such a promise would be like that now set up. In reality,

there was no consideration whatever. The son had no right to complain, for the father might make what distribution of his property he liked; and the son's abstaining from doing what he had no right to do can be no consideration. * * *

Judgment for the plaintiff.

Forbearance, disadvantage suffered, etc., as a consideration

MARY BURGESSER *v.* WENDEL,

73 N. J. L. 286 (1906).

SWAYZE, J.: The district court found that the plaintiff had resided with the defendant prior to his marriage; that upon that event he provided another house for her, and promised to pay her a certain sum (afterwards fixed at $10) weekly as long as she should continue to reside in the new house; that she was still residing in the house, and that the defendant had failed to pay the weekly allowance for ten weeks. He rendered judgment in favor of the plaintiff for $80.

It is now argued on behalf of the defendant that the facts as found do not warrant the judgment, because they fail to show a consideration and because, to state the point in the language of the appellant's brief, "there was no agreement in this case as contemplated by the statute of frauds, because there was simply a voluntary payment without consideration." Before the trial court this objection was stated to be that the contract was not to be performed within one year.

We think the case shows an agreement and not a mere voluntary payment. There was an arrangement between the parties for a change of the plaintiff's residence, and upon this arrangement she acted. If this were not so, the point

was not made in the trial court, and cannot now be considered.

There was a legal consideration for the defendant's promise. The change of the plaintiff's residence may have been a benefit to the defendant or a detriment to the plaintiff, or both. * * *

We find no errors, and the judgment must be affirmed, with costs.

Forbearance, disadvantage suffered, etc., as a consideration

MELROY *v.* KEMMERER, APPELLANT,

218 Pa. 381 (1907).

Appeal from judgment for plaintiff.

Opinion by Chief Justice Mitchell. It was said in Ebert *v.* Johns, 206 Pa. 395, that the rule that the acceptance of a smaller sum for a debt presently due, though agreed and expressed to be payment in full, is not a good accord and satisfaction, was a deduction of scholastic logic and was always regarded as more logical than just, and hence any circumstance of variation is sufficient to take a case out of the rule. As illustrations of such circumstances of variation, it has been held that payment a day, or even an hour, before the debt is due, or at a different place, or of a certainty in amount where the amount of the debt is uncertain, or payment of even a part by a third person, or additional security of any kind, such as the indorsement of a note by a third person, or payment in chattels or anything other than money, will be a good discharge of the whole by way of accord and satisfaction.

The rule itself is founded on the want of consideration for the agreement. As a part can never be equal to the whole, the payment of a part of the debt presently due

gives the creditor nothing that he was not entitled to and deprives the debtor of nothing he was not bound to part with before, and therefore there is no consideration. The logic is unimpeachable, but it fails to take into consideration the practical importance of the difference between the right to a thing and the actual possession of it. As said in Ebert *v.* Johns, "to a merchant with a note coming due, $5,000 before three o'clock to-day, which will save his commercial credit, may well be worth more than $20,000 to-morrow, after his note has gone to protest." If the debt is not due until to-morrow, the payment of the lesser sum under all the cases will be a good accord and satisfaction, but if the debt was due yesterday, but the debtor can only pay part to-day, the benefit to the creditor of getting that part now, rather than the whole when it is too late, is just as great, and whatever conclusion the scholastic logic and theoretical reasoning may lead to, the importance of the practical result is a matter for the creditor to decide for himself, and, having so decided and got the benefit of it, justice and common honesty ought to hold him to his agreement. For this reason, the force of which is universally accepted, the courts, so far as they could without sacrifice of the maxim of stare decisis, have brought the law into closer accord with modern business principles.

In the present case the debtor, being in failing circumstances and contemplating bankruptcy, offered the plaintiffs 30 per cent. of his debt as a settlement in full. The plaintiffs dissuaded him from going into bankruptcy, accepted his alternative offer, received the money and closed the account. They have now brought this suit for the balance. In the absence of any expressed decision in this State on this point, the learned judge below did not feel at liberty to depart from the general rule. We have no such hesitation. The exact point is whether the debtor's relinquishment of his intention to seek a discharge in bankruptcy and his payment of 30 per cent. instead constitute

a sufficient consideration to bind the creditor to the agreement. On that point we have no doubt.

A valuable consideration may consist in some right, interest or benefit to one party, or some loss, detriment or responsibility resulting actually or potentially to the other. Bouvier's Law Dict. "If there is any advantage to the creditor, the law will not say the adequacy of the consideration." Fowler *v.* Smith, 153 Pa. 639.

The accord in this case was good on both branches. By it the creditors got a sum certain, instead of the chance of an uncertain dividend in bankruptcy; on the other hand, the debtor accepted the responsibility of paying a sum certain whether his assets were sufficient or not, and gave up his right to a release of his future assets, and to a discharge from his whole debt without regard to the sufficiency of his present assets.

The decisions on this exact point in other States are not numerous, but the general trend is uniform to the result we have reached. In Hinckley *v.* Arey, 27 Me. 362, it was said by Tenny, J.: "In this case the plaintiff was informed that the defendant contemplated taking the benefit of the bankrupt act, which was then in force. If this intention had been carried out, the plaintiff would lose the whole debt, beyond what he might receive as a dividend; and the latter, judging from his letter, he did not consider as very valuable. To save himself from a greater loss under the law, he agreed upon the terms of composition offered. The defendant, upon the agreement and payment to Hubbard, took no further steps to obtain relief under the bankrupt law." It was accordingly held that the accord and satisfaction were good. In Curtis *v.* Martin, 20 Ill. 557; Engbretson *v.* Seiberling, 122 Iowa 522; Rive *v.* London, etc., Mortgage Co., 70 Minn. 77, the courts went still further and held the satisfaction valid where the debtor was insolvent or in failing circumstances, though there was no express intention to seek a discharge in bankruptcy. In the last-named case it was held that an agreement on behalf of the estate

of a debtor supposed to be insolvent was good, though it turned out in fact that it was solvent. And in Pettigrew Co. *v.* Harmon, 45 Ark. 290, the principle that part payment by a third person makes the accord valid was held to govern where the third person was one to whom the debtor had assigned his assets for the payment of his debts.

Judgment reversed.

Forbearance, disadvantage suffered, etc., as a consideration

WILLIAM E. SHERWIN AND OTHERS, TRUSTEES, *v.* SAMUEL W. FLETCHER,

168 Mass. 413 (1897).

Action on contract on the following agreement:

"We, the undersigned subscribers, do hereby agree to pay the sum set against our respective names, the same to be payable under and in accordance with the following conditions, namely:

"1. The money by us subscribed is to be used for the purpose of erecting a building in the town of Ayer, to be used for the manufacture of boots and shoes.

"2. The details regarding the plan under which the subscribers hereto shall organize themselves, and upon which said building shall be erected and rented, shall be hereafter fixed and determined by a majority in numbers and interest of the subscribers hereto, at a meeting to be duly called for that purpose.

"3. No subscription hereto shall be binding until the sum of twelve thousand ($12,000) dollars shall have been raised.

"SAMUEL W. FLETCHER. $200."

The declaration alleged that the defendant signed the above contract (a copy whereof was annexed) and thereby agreed, in consideration of other parties signing similar agreements, to pay such person or persons as should be determined upon by the majority in numbers and interest of such subscribers the sum of $200, upon the terms and conditions therein specified and set forth; that the sum of $12,000 was subscribed; that at a meeting of such directors, duly notified and called for that purpose, it was determined

by a majority in numbers and interest of the subscribers to organize, and they did so organize under the name of the "Ayer Building Association"; that the plaintiffs were duly chosen trustees, and by votes of said association were duly authorized and empowered to purchase a tract of land in the town of Ayer, and erect thereon a building for the manufacture of boots and shoes, and to collect all subscriptions; that, relying upon the promise of the defendant, and being so authorized as aforesaid, they did purchase a tract of land in the town of Ayer and erect thereon a building for the manufacture of boots and shoes, and demanded of the defendant the amount of his said subscription, to wit, the sum of $200, but the defendant refused, and still refuses to pay the same.

The defendant demurred to the declaration, assigning as grounds therefor: 1. That it did not appear by said declaration and the contract annexed thereto that the defendant made any promise or agreement to pay the plaintiffs, or any promise or agreement upon which the plaintiffs were entitled to recover. 2. That the plaintiffs did not allege in their declaration, nor did it appear by the contract, that there was any sufficient consideration for the defendant entering into the contract.

The Superior Court overruled the demurrer, and the defendant appealed to this court.

ALLEN, J.: The demurrer to the declaration was rightly overruled. The written agreement signed by the defendant was virtually a promise to pay to such person or persons as should be fixed at a meeting of the subscribers. This promise was at the outset an offer, but when steps were taken in pursuance of Article 2, and a plan was fixed and determined as therein provided, and the plaintiffs were chosen trustees, they became the promisees; and when they proceeded to erect a building in reliance upon the subscriptions of the defendant and others, and before any withdrawal or retraction by him, that supplied a good consideration, and the promise became valid and binding in law.

Judgment affirmed.

Forbearance, disadvantage suffered, etc., as a consideration

MARSHALLTOWN STONE CO., APPELLANT, *v.* DES MOINES BRICK MFG. CO.,

114 Iowa 574 (1901).

Action on contract. A demurrer to the petition was sustained, and judgment rendered against the plaintiff. The plaintiff appeals.

SHERWIN, J.: The petition alleges that in August, 1898, the plaintiff was about to enter into a contract to furnish crushed rock for use in a certain street in Des Moines, then about to be paved; that the defendant then agreed to pay plaintiff the sum of 25 cents per cubic yard for the crushed rock used in paving said street, on condition that the plaintiff would not enter into the contemplated contract nor sell any crushed rock in the city of Des Moines during the remainder of the year 1898; and that the plaintiff carried out the terms of this agreement. The demurrer assails the petition for want of consideration, and on the ground that the agreement was against public policy and void because tending to prevent competition.

The consideration for the agreement on the part of the defendant was sufficient. The plaintiffs agreed to and did refrain from entering into the contemplated contract, and refrained from selling crushed stone in the city of Des Moines during the remainder of the year 1898. It is to be presumed that the sale of stone in Des Moines would have been a benefit to the plaintiff, and that by not doing so he suffered a loss. Any forbearance practiced by a party to a contract, or any detriment or loss suffered by him, is sufficient consideration for the other's promise. In the case of Chapin *v.* Brown, 83 Iowa 156, relied upon by appellee, the plaintiff sued for damages because the defendants had again entered the butter trade after agreeing not to do so. The plaintiff had clearly paid nothing for the promise, and upon the execution of the bare agreement, without the pay-

ment of a cent, he had at once established a lucrative business; hence had not foreborn or suffered anything.

The agreement was that the plaintiff would not enter into the particular contract contemplated for furnishing crushed stone for the particular job of paving then under way, and further that he would not sell said material in the city of Des Moines during the period of about five months. It was limited as to time, place, and commodity. So far as is shown by the petition, there was no attempt to restrain competition in furnishing that particular product. There might have been a large number of others anxious and willing to supply the public demand for crushed rock. Nothing appears therefrom which in the least indicates an intention to oppress or create a monopoly in that particular product. The contract was therefore not void as against public policy. In the Chapin-Brown case, *supra*, it appeared that all the merchants of Storm Lake had entered into an agreement, and it might well be said that it was a contract creating a monopoly, and hence against public policy.

The judgment is reversed.

Composition with creditors—Promise for a promise

ROBERT *v.* BARNUM ET AL.,

80 Ky. 28 (1882).

Appeal from judgment for defendants (appellees).

PRYOR, J.: The validity of agreements between creditors, entered into for the purpose of releasing an insolvent debtor, when made in good faith, cannot be questioned; and when the debtor has in this manner procured his release, and is willing and offers to comply with the terms of the agreement, there is no reason why it should not be enforced. The basis of settlement in this case was, that ninety per

cent. of the creditors for merchandise sold the debtor should sign the composition agreement. Perfect equality, unless otherwise agreed upon, should exist between the creditors named, the one having no advantage over the other. The execution of the agreement by one creditor is the inducement for the others to do likewise. All agreeing to relinquish their claims for a particular purpose; that is, to relieve the debtor from his insolvent condition, and the agreement to release by one is a sufficient consideration for the release by the other. The creditors are the parties contracting for the relief of the insolvent, and when the latter complies, by paying or tendering the money, or whatever is required to release him from his obligations by the terms of the settlement composition, the creditor is bound to accept it. An agreement by the creditor with his debtor to take less than his debt, based on no other consideration than to relieve him from his pecuniary embarrassment, cannot be enforced; but when the creditors enter into an agreement with each other that they will relieve the debtor by releasing a part of their demands, the agreement can be enforced even by the debtor, who can accept the terms fixed by his creditors, and comply with the agreement. The creditors contracted with each other in this case to the effect that "they would accept twenty-five cents on a dollar cash, in full settlement of our claims to date. This paper is not binding unless signed by creditors representing ninety per cent. of his merchandise indebtedness."

The creditors representing ninety per cent. of this indebtedness signed the agreement, and all of them have accepted the twenty-five cents on the dollar except the appellants. They say they are not bound by the agreement, because the appellee (the debtor) made an assignment of his property to a trustee for the benefit of creditors, after this composition agreement was entered into. This the appellee may have done for his own protection, or to bring about, if the composition agreement failed for want of the proper number of signatures, an equal distribution of his property

or its proceeds between his creditors. The proof conduces to show that one creditor had at least attached his goods, and to prevent such preferences he made the assignment. There is no evidence of any fraud practiced by the appellee; but, on the contrary, he proceeded, after the assignment of his property, to obtain the requisite number of signatures in order to effect the settlement; and this having been done within a reasonable time, he proceeded to pay off his creditors under the composition agreement. He paid all but the two appellants, and they are now insisting that as his estate is amply sufficient to pay them, the other creditors being satisfied, there is no reason for holding them to the agreement. It is argued that this is a controversy between the creditor and debtor only, as all his other creditors are satisfied, and the debtor is able to pay them. The inquiry at once arises, what placed the debtor in a condition by which his ability to pay these two debts is unquestioned? The response is, the surrender by all of his creditors of their claims upon the payment of twenty-five cents on the dollar. The creditors' money is left with, or given to the debtor, by reason of the agreement the appellants are seeking to avoid. The chancellor, in allowing their claims in full, would be aiding the appellants to take an improper advantage of those with whom they had, in good faith, contracted, by using their means, or what, as between the appellant and the other creditors, belonged in law and equity to the latter, to pay appellants' debts. They knew of the assignment by the appellee, or if not, they knew of the acceptance by the creditors, or many of them, of the sum agreed on in full discharge of their debts, and neither a court of law or conscience should give them this advantage.

They had no more right in equity to this money than if they had made a secret arrangement with the appellee to pay their debts in full at the time they signed the agreement. The assignment of the estate of appellee for creditors did not change the relation of the parties. It placed the creditor in no worse condition, and even an absolute sale,

if made in good faith, to enable the debtor to comply with the agreement, could not have been deemed fraudulent. It would be unjust to both the debtor and those of his creditors who had released their claims, to permit this defence. The obligation to comply was reciprocal, and no creditor signing the paper can disregard his agreement so as to prevent the equitable adjustment, and the chancellor will not hesitate to enforce it. The debtor may refuse to comply or decline by his acts to recognize the agreement, and if so, the creditor is not bound; we find no such refusal in this case.

Judgment affirmed.

Consideration need not be adequate

BAINBRIDGE *v.* FIRMSTONE,

8 A. & E. 743 (1838).

Assumpsit. The declaration stated that, whereas, heretofore, to wit, etc., in consideration that plaintiff, at the request of defendant, had then consented to allow defendant to weigh divers, to wit, two boilers, of the plaintiff, of great value, etc., defendant promised that he would, within a reasonable time after the said weighing was effected, leave and give up the boilers in as perfect and complete a condition and as fit for use by plaintiff as the same were in at the time of the consent so given by plaintiff; and that, although in pursuance of the consent so given, defendant, to wit, on, etc., did weigh the same boilers, yet defendant did not nor would, within a reasonable time after the said weighing was effected, leave and give up the boilers in as perfect, etc., but wholly neglected and refused so to do, although a reasonable time for that purpose had elapsed before the commencement of this suit; and, on the contrary thereof, defendant afterward, to wit, on, etc., took the said

boilers to pieces, and did not put the same together again, but left the same in a detached and divided condition, and in many different pieces, whereby plaintiff hath been put to great trouble, etc. Plea, *non assumpsit*.

DENMAN, C. J.: It seems to me that the declaration is well enough. The defendant had some reason for wishing to weigh the boilers, and he could do so only by obtaining permission from the plaintiff, which he did obtain by promising to return them in good condition. We need not inquire what benefit he expected to derive. The plaintiff might have given or refused leave.

PATTERSON, J.: The consideration is, that the plaintiff, at the defendant's request, had consented to allow the defendant to weigh the boilers. I suppose the defendant thought he had some benefit; at any rate, there is a detriment to the plaintiff from his parting with the possession for even so short a time.

Consideration need not be adequate

SMOCK *ET AL. v.* PIERSON, EXECUTOR,
68 Ind. 405 (1879).

Appeal from judgment for the plaintiff (Pierson).

The action in this case was by Charles C. Pierson, as executor of Ebenezer Smith, deceased, against W. C. Smock and D. M. Ransdell upon a promissory note payable to the testator. The defense was that note was given without any good or valuable consideration.

It appeared in the evidence that Smock and Ransdell (appellants) and the deceased had been engaged in a partnership business for the purchase and sale of real estate on commission; that in October, 1873, the firm was dissolved because of the illness of deceased, who retired, leaving Smock and Ransdell to continue the business. The note

in question was given, according to one of the appellant's witnesses, in settlement of deceased's interest in the good will of the business.

The appellants, in answer to interrogatories addressed to them, stated, in substance, that the deceased was not willing to take his share of the profits simply, but that, knowing the fatal character of his sickness and his inability to perform further labor, and to humor him merely, and fearing that a refusal on their part would make him physically worse, they executed the note sued on.

Several other witnesses, familiar with the real estate business, testified that the financial revulsion of September, 1873, practically destroyed all trade in real estate in Indianapolis, and that, for that and other reasons growing out of the peculiar nature of the business, the good will claimed to have been sold by the deceased to the appellants was of no value whatever. There was evidence, however, tending to show that, at the time of the execution of the note in suit, there was a very general impression amongst dealers in real estate about Indianapolis, that there would be, within a few months at the farthest, a favorable reaction in their line of business.

NIBLACK, J.: The good will of a trade or business was tersely called by Lord Eldon, "the probability that the old customers will resort to the old place." This probability results from an established business at a particular place, indicating to the public where and in what manner it is carried on. It is well settled that the "good will" of a business, like a trade-mark, is a species of property subject to sale by the proprietor, and which may be sold by order of court. 1 Parsons Contracts, 153; The Glen and Hall Manufacturing Co. *v.* Hall, 61 N. Y. 226.

In estimating the value of a thing as the consideration for a promise, there is a manifest distinction between property of a certain and determinate value and things which have but a contingent and indeterminate value. But, in any event, mere inadequacy of consideration is not suffi-

cient to defeat a promise. It is sufficient that the consideration shall be of some value. It may only be of slight value, or such as could be of value to the party promising. 1 Chitty Contracts, 29.

Where a party gets all the consideration he voluntarily and knowingly contracts for, he will not be allowed to say that he got no consideration. Baker *v.* Roberts, 14 Ind. 552.

In the case at bar there was no pretense of fraud or concealment on the part of Smith. The appellants had every opportunity of understanding the condition of their firm's business, and in that respect Smith certainly had no advantage of them. Up to the time when Smith retired, the firm had been successful in the establishment of a good business, and in attracting the attention of persons dealing in real estate. It was quite apparent from the evidence that the appellants desired to continue in the business thus seemingly established by the firm. It was equally apparent that, for reasons satisfactory to themselves, they wished to get Smith out of the firm, and to do so in such a way as would work no disturbance in their business, and would, at the same time, continue to them the "good will" which the firm had enjoyed up to that time. To accomplish these objects, they agreed to give Smith and those interested with him one thousand dollars, in addition to the amount which he was entitled to receive as his share of the profits from their joint business. The promise thus made was a binding promise upon the appellants, without reference to whether the arrangement would prove to be a profitable one to them or not, for better or for worse, they got what they bargained for, and they now have no lawful reason to complain.

If their expectations as to future business were not realized, that was a misfortune for which Smith was not in any manner legally responsible. That circumstance did not even tend to show a want of consideration for the note in controversy, when it was given.

We are, therefore, of the opinion that the appellants' defense was not made out by the evidence, and that, consequently, the court below at special term did not err in its refusal to grant the appellants a new trial.

The judgment at general term is affirmed.

Consideration must be real

SCHNELL *v.* NELL,

17 Ind. 29 (1861).

PERKINS, J.: Action by J. B. Nell against Zacharias Schnell, upon the following instrument:

"This agreement, entered into this 13th day of February, 1856, between Zach. Schnell, of Indianapolis, Marion County, State of Indiana, as party of the first part, and J. B. Nell, of the same place, Wendelin Lorenz, of Stilesville, Indiana, and Donata Lorenz, of Frickinger, Germany, as parties of the second part, witnesseth: The said Zacharias Schnell agrees as follows: whereas his wife, Theresa Schnell, now deceased, has made a last will and testament, in which, among other provisions, it was ordained that every one of the above named second parties should receive the sum of $200; and whereas the said provisions of the will must remain a nullity, for the reason that no property, real or personal, was in the possession of the said Theresa Schnell, deceased, in her own name, at the time of her death, and all property held by Zacharias and Theresa Schnell jointly, therefore reverts to her husband; and whereas the said Theresa Schnell has also been a dutiful and loving wife to the said Zach. Schnell, and has materially aided him in the acquisition of all property, real and personal, now possessed by him; for, and in consideration of all this, and the love and respect he bears to his wife; and, furthermore, in consideration of one cent, received by him of the second parties, he, the said Zach. Schnell, agrees to pay the above named sums of money to the parties of the second part, to wit: $200 to the said J. B. Nell; $200 to the said Wendelin Lorenz; and $200 to the said Donata Lorenz, in the following installments, viz., $200 in one year from the date of these presents; $200 in two years, and $200 in three years; to be divided between the parties in equal portions of $66 2-3 each year, or as they may agree, till each one has received his full sum of $200.

"And the said parties of the second part, for, and in consideration of this, agree to pay the above named sum of money (one cent) and to deliver up to said Schnell, and abstain from collecting any real or supposed claims upon him or his estate, arising from

the said last will and testament of the said Theresa Schnell, deceased.

"In witness whereof, the said parties have, on this 13th day of February, 1856, set hereunto their hands and seals.

"ZACHARIAS SCHNELL, (Seal)
"J. B. NELL, (Seal)
"WEN. LORENZ." (Seal)

The complaint contained no averment of a consideration for the instrument, outside of those expressed in it; and did not aver that the one cent agreed to be paid had been paid or tendered.

A demurrer to the complaint was overruled.

The defendant then answered that the instrument sued on was given for no consideration whatever.

He further answered that it was given for no consideration because his said wife, Theresa, at the time she made the will mentioned, and at the time of her death, owned, neither separately nor jointly with her husband or any one else (except so far as the law gave her an interest in her husband's property), any property, real or personal, etc.

The will is copied into the record, but need not be into this opinion.

The Court sustained a demurrer to these answers, evidently on the ground that they were regarded as contradicting the instrument sued on, which particularly set out the considerations upon which it was executed. But the instrument is latently ambiguous on this point.

The case turned below, and must turn here, upon the question whether the instrument sued on does express a consideration sufficient to give it legal obligation, as against Zacharias Schnell. It specifies three distinct considerations for his promise to pay $600:

1. A promise on the part of the plaintiffs to pay him one cent.

2. The love and affection he bore his deceased wife, and the fact that she had done her part, as his wife, in the acquisition of property.

3. The fact that she had expressed her desire, in the form of an inoperative will, that the persons named therein should have the sums of money specified.

The consideration of one cent will not support the promise of Schnell. It is true, that as a general proposition, inadequacy of consideration will not vitiate an agreement. But this doctrine does not apply to a mere exchange of sums of money, of coin, whose value is exactly fixed, but to the exchange of something of, in itself, indeterminate value, for money, or, perhaps, for some other thing of indeterminate value. In this case, had the one cent mentioned, been some particular one cent, a family piece, or ancient, remarkable coin, possessing an indeterminate value, extrinsic from its simple money value, a different view might be taken. As it is, the mere promise to pay six hundred dollars for one cent, even had the portion of that cent due from the plaintiff been tendered, is an unconscionable contract, void, at first blush, upon its face, if it be regarded as an earnest one. The consideration of one cent is, plainly, in this case, merely nominal, and intended to be so. As the will and testament of Schnell's wife imposed no legal obligation upon him to discharge her bequests out of his property, and as she had none of her own, his promise to discharge them was not legally binding upon him, on that ground. A moral consideration, only, will not support a promise. And for the same reason, a valid consideration for his promise cannot be found in the fact of a compromise of a disputed claim; for where such claim is legally groundless, a promise upon a compromise of it, or of a suit upon it, is not legally binding. There was no mistake of law or fact in this case, as the agreement admits the will inoperative and void. The promise was simply one to make a gift. The past services of his wife, and the love and affection he had borne her, are objectionable as legal consideration for Schnell's promise, on two grounds: 1. They are past considerations. 2. The fact that Schnell loved his wife, and that she had been industrious, consti-

tuted no consideration for his promise to pay J. B. Nell, and the Lorenzes, a sum of money. Whether, if his wife, in her lifetime, had made a bargain with Schnell, that, in consideration of his promising to pay, after her death, to the persons named, a sum of money, she would be industrious, and worthy of his affection, such a promise would have been valid and consistent with public policy, we need not decide. Nor is the fact that Schnell now venerates the memory of his deceased wife, a legal consideration for a promise to pay any third person money.

The instrument sued on, interpreted in the light of the facts alleged in the second paragraph of the answer, will not support an action. The demurrer to the answer should have been overruled.

PER CURIAM: The judgment is reversed, with costs. Cause remanded, etc.

Doing what one is legally bound to do—Contract obligation

STILK *v.* MYRICK,

2 Camp. 317 (1809).

This was an action for seaman's wages, on a voyage from London to the Baltic and back.

By the ship's articles, executed before the commencement of the voyage, the plaintiff was to be paid at the rate of £5 a month; and the principal question in the cause was, whether he was entitled to a higher rate of wages. In the course of the voyage two of the seamen deserted, and the captain, having in vain attempted to supply their places at Cronstadt, there entered into an agreement with the rest of the crew, that they should have the wages of the two who had deserted equally divided among them if he could not procure two other hands at Gottenburgh. This was found impossible, and the ship was worked back to London by the plaintiff and eight more of the original crew, with whom the agreement had been made at Cronstadt.

LORD ELLENBOROUGH: I think Harris *v.* Watson was rightly decided; but I doubt whether the ground of public policy, upon which Lord Kenyon is stated to have proceeded, be the true principle on which the decision is to be supported. Here I say, the agreement is void for want of consideration. There was no consideration for the ulterior pay promised to the mariners who remained with the ship. Before they sailed from London they had undertaken to do all they could under all the emergencies of the voyage. They had sold all their services till the voyage should be completed. If they had been at liberty to quit the vessel at Cronstadt, the case would have been quite different; or if the captain had capriciously discharged the two men who were wanting, the other might not have been compelled to take the whole duty upon themselves, and their agreeing to do so might have been a sufficient consideration for the promise of an advance of wages. But the desertion of a part of the crew is to be considered an emergency of the voyage as much as their death, and those who remain are bound by the terms of their original contract to exert themselves to the utmost to bring the ship safely to her destined port. Therefore, without looking to the policy of this agreement, I think it is void for want of consideration, and that the plaintiff can only recover at the rate of £5 a month.

Verdict accordingly.

Doing what one is legally bound to do—Contract obligation

LEWIS F. F. ABBOTT *v.* VALENTINE DOANE, JR., 163 Mass. 433 (1895).

Action on contract upon a promissory note for $500, dated December 27, 1892, payable in three months after date to the order of the plaintiff, and signed by the defendant. The answer set up want of consideration. At the trial

in the Superior Court, before Bond, J., the jury returned a verdict for the plaintiff, to which the defendant took exceptions.

ALLEN, J.: The plaintiff had given his accommodation note to a corporation, which had had it discounted at a bank, and left it unpaid at its maturity. The defendant, being a stockholder, director and creditor of the corporation, wishing to have the note paid at once for his own advantage, entered into an agreement with the plaintiff whereby he was to give to the plaintiff his own note for the amount, and the plaintiff was to furnish money to enable the defendant to take up the note at the bank. This agreement was carried out, and the defendant now contends that his note to the plaintiff was without consideration, because the plaintiff was already bound in law to take up the note at the bank.

It is possible that, for one reason or another, both the bank and the plaintiff may have been willing to wait for a while, but that the defendant's interests were imperiled by a delay, and indeed required that the note should be paid at once, and that the corporation, whose duty it was primarily to pay it, was without present means to do so. Since the defendant was sane, *sui juris*, was not imposed upon nor under duress, knew what he was about, and probably acted for his own advantage, it would certainly be unfortunate if the rules of law required us to hold his note invalid for want of a sufficient consideration, when he has had all the benefit that he expected to get from it.

In this Commonwealth it was long ago decided that, even between the original parties to a building contract, if after having done a part of the work, the builder refused to proceed, but afterward, on being promised more pay by the owner, went on and finished the building, he might recover the whole sum so promised.

But when one who is unwilling or hesitating to go on and perform a contract which proves a hard one for him is requested to do so by a third person who is interested in

such performance, though having no legal way of compelling it, or of recovering damages for a breach, and who accordingly makes an independent promise to pay a sum of money for such performance, the reasons for holding him bound to such payment are stronger than where an additional sum is promised by the party to the original contract.

Take an illustration: A. enters into a contract with B. to do something. It may be to pay money, to render service, or to sell land or goods for a price. The contract may be not especially for the benefit of B., but rather for the benefit of others; as, *e. g.*, to erect a monument, an archway, a memorial of some kind, or to paint a picture to be placed where it can be seen by the public. The consideration moving from B. may be executed or executory; it may be money, or anything else in law deemed valuable; it may be of slight value as compared with what A. has contracted to do. Now A. is legally bound only to B., and if he breaks his contract nobody but B. can recover damages, and those damages may be slight. They may even be already liquidated at a small sum by the terms of the contract itself. Though A. is legally bound, the motive to perform the contract may be slight. If after A. has refused to go on with his undertaking, or while he is hesitating whether to perform it or submit to such damages as B. may be entitled to recover, other persons interested in having the contract performed intervene, and enter into a new agreement with A., by which A. agrees to do that which he was already bound by his contract with B. to do, and they agree jointly or severally to pay him a certain sum of money, and give their note or notes therefor, and A. accordingly does what he had before agreed to do, but what perhaps he might not otherwise have done, no good reason is perceived why they should not be held to fulfill their promise. They have got what they bargained for, and A. has done what otherwise he might not have done, and what they could not have compelled him to do.

Editor's Note.—According to the weight of authority in this country a promise to perform an existing contract with a third person or performance of it does not constitute a valid consideration. The contrary is the law in England, and it has been maintained recently by an American writer that in most of the American cases the English cases were not brought to the attention of the Court, and that the latest decisions show a marked tendency toward the English rule. 9 Cyc. 353.

Without dwelling further on the reasons for the doctrine, it seems to us better to hold, as a general rule, that if A. has refused or hesitated to perform an agreement with B., and is requested to do so by C., who will derive a benefit from such performance, and who promises to pay him a certain sum therefor, and A. thereupon undertakes to do it, the performance by A. of his agreement in consequence of such request and promise by C. is a good consideration to support C.'s promise.

Exceptions overruled.

Doing what one is legally bound to do—Non-Contract obligation

FINK *v.* SMITH, APPELLANT,

170 Penna. 124 (1895).

Appeal from judgment for plaintiff.

Action of replevin to recover a mare.

DEAN, J.: Smith, the defendant, at a sheriff's sale of the personal property of one Sarah Hyde, wife of George Hyde, purchased a mare; then, as a mere act of kindness towards Mrs. Hyde, he left the animal temporarily with her; some months afterwards, George Hyde, the husband, sold the mare to Fink, the plaintiff, who took her into his possession; Smith, the owner, hearing of this went to Fink and demanded his property, but he refused to surrender possession; then Smith informed Gallatin, the sheriff, who had sold her to him, of the wrong and threatened to replevy her; Gallatin replied that was not necessary as he would get her for him; Gallatin went to Fink, and obtained a promise from him to restore the mare to Smith without a replevin; then Smith again went to Fink and the mare was delivered to him on the condition that, if on an indictment for larceny of the mare then pending against George Hyde

there should be an acquittal, the mare should be returned, but if Hyde were convicted, Smith was to keep her. Hyde was acquitted of larceny. Thereupon, Fink replevied the mare. When the case came to trial, the facts turned out as we have stated them from the admissions of the parties and the findings of the jury. The verdict was for Fink, plaintiff, in damages to the value of the mare. Hence this appeal by Smith, defendant.

The controlling assignment of error and which in substance embraces all the error alleged is raised by the following excerpt from the charge of the learned judge of the court below: "The only question remaining in this case is whether the mare was, under this agreement, to be returned to Fink, if Hyde was acquitted of the charge in court of the larceny of the mare. If so, then we instruct you that there was sufficient consideration for that agreement at the time of the lawsuit in order to recover her, and at the time this mare was involved in the threatened lawsuit; and the only way that he could get her without a lawsuit was by making this agreement that it is alleged on the part of the plaintiff was made between Fink and Smith. If you believe such an agreement was made then your verdict should be for the plaintiff for the value of the mare with interest from that time."

Was this correct instruction, as to the law applicable to the evidence? There was no dispute as to the ownership of the property; the mare, it was conceded, belonged to Smith; and although he testified no such conditional bargain was made, it was just as positively testified to, on the other side, that it was made, and the jury have found the fact against him. So, we have the unquestioned owner of the mare, bargaining with one in wrongful possession, for her surrender; the possession thereafter to be determined by the verdict in a criminal prosecution, then pending. Was his possession, thus obtained, wrongful as against Fink, when the event of the prosecution was the acquittal of Hyde? That depends on the valadity of the contract between them.

1. The contract was void, because based on a fact which did not exist, though both parties assumed it to be a fact. Fink purchased from George Hyde; both assumed that Hyde's title would necessarily be determined by his acquittal or conviction of larceny; but the event of the prosecution in no wise determined that; it determined only that the evidence did not show, beyond a reasonable doubt, a felonious intent; what the weight of it showed, we do not know; but the admitted facts here, that the mare is Smith's, and that Hyde sold her, also show conclusively that Hyde was guilty of either larceny or trespass. So their assumption, that the criminal prosecution would determine Hyde's title, and necessarily theirs, was a mutual mistake of fact. "Where certain facts assumed by both parties are the basis of a contract, and it subsequently appears such facts do not exist, the contract is inoperative:" Horbach *v.* Gray, 8 W. 497.

2. There was no consideration to support Smith's promise. A promise made by the owner to obtain possession of his goods, which at the time are wrongfully withheld from him, is without consideration: Chitty on Contracts, p. 51; Addison on Contracts, 13. This principle is conceded by the learned judge of the court below, and the undoubted wrongful possession by Fink of Smith's property is also conceded. But he assumes, there is no evidence that Fink knew this at the time he delivered it to Smith, and therefore the contract should be treated as a compromise of doubtful litigation, which is a good consideration to support a contract. But the error in this view is, that Fink's wrongful possession did not depend on what he knew, but on the fact. Was it Smith's property? Had he demanded it from him who wrongfully detained it? If these were the facts, and they are not denied, then, there was no consideration for Smith's promise, for no benefit passed to Smith, and Fink sustained no loss by the contract; to hold that the abandonment of a wholly wrongful detention of another's property can form the basis of a compromise contract with the owner

is direct encouragement to the commission of wrong for profit, and for this very reason the law holds the contract to be without consideration. If Fink had been indicted for the larceny of the mare, his knowledge of the ownership would have been material in determining his guilt, but it is of no moment in determining the fact of ownership.

3. While we think it is of doubtful public policy to enforce a contract, where the right to property is made to turn on a verdict in a criminal prosecution, in which both parties to the contract are witnesses, we do not decide the case on that point.

We are of opinion, however, the contract was based on a mutual mistake of a fact, which had no existence, and further, was without consideration. Therefore the judgment is reversed.

Doing what one is legally bound to do—Non-Contract obligation

SMITH *v.* WHILDIN,

10 Pa. 39 (1848).

Action of assumpsit. The plaintiff, who was a constable in Philadelphia, proved that the defendant had offered him a reward of $100 for the arrest of one M. Crossin, against whom warrants had been issued on a charge for obtaining goods under false pretenses. Under one of these warrants M. Crossin was arrested, in Philadelphia, by plaintiff's deputy.

CAMPBELL, J., told the jury the only question was, whether the defendant made the promise.

COULTER, J., (after stating the case): There was no consideration for the promise, and the court below therefore misconceived the law. It is the duty of a constable to pursue, search for, and arrest offenders against whom

criminal process is put into his hands. It is stated in Com. Digest, (title Justice of the Peace, B. 79), that the duty of a constable requires him to do his utmost to discover, pursue, and arrest felons. The office of constable is created not for the private emolument of the holder; but to conserve the public peace, and to execute the criminal law of the country. He is not the agent or employe of the private prosecutor, but the minister of the law, doing the work of the public, which he is bound to do faithfully for the fee prescribed by law, to be paid as the law directs. And it would be against public policy as well as against law to hold otherwise.

There are things which a constable is not officially bound to do, such as to procure evidence, and the like, and for this he may perhaps be allowed to contract. And this is the full extent of the principle in the case cited from 11 Ad. and El. 856. But it has been held that even a sailor cannot recover for extra work on a promise by the master to pay for extra work in managing the ship in peril, the sailor being bound to do his utmost independently of any fresh contract. Stilk *v.* Myrick, 2 Camp. 317, and the cases there cited.

It would open a door to profligacy, chicanery, and corruption, if the officers appointed to carry out the criminal law were permitted to stipulate by private contract; it would open a door to the escape of offenders by culpable supineness and indifference on the part of those officers, and compel the injured persons to take upon themselves the burden of public prosecution. It ought not to be permitted. Constables must do their utmost to discover, pursue, and arrest offenders within their township, district, or jurisdiction, without other fee or reward than that given by the law itself.

Judgment reversed, and a new trial awarded.

Accord and satisfaction

JAFFRAY ET AL., RESPONDENTS, *v.* DAVIS ET AL., APPELLANTS,

124 N. Y. 164 (1891).

This was an action to recover a balance claimed to be due upon an indebtedness.

POTTER, J.: The facts found by the trial court in this case were agreed upon. They are simple and present a familiar question of law. The facts are that defendants were owing plaintiffs on December 8, 1886, for goods sold between that date and the May previous at an agreed price, the sum of $7714.37, and that on the 27th of the same December the defendants delivered to the plaintiffs their three promissory notes, amounting in the aggregate to $3462.24, secured by *a chattel mortgage on* the stock, fixtures, and other property of defendants, located in East Saginaw, Mich., which said notes and chattel mortgage were received by plaintiffs under an agreement to accept same in full satisfaction and discharge of said indebtedness. "That said notes have all been paid and said mortgage discharged of record."

The question of law arising from these facts and presented to this court for its determination is whether such agreement, with full performance, constitutes a bar to this action, which was brought after such performance to recover the balance of such indebtedness over the sum so secured and paid.

One of the elements embraced in the question presented upon this appeal is, viz., whether the payment of a sum less than the amount of a liquidated debt under an agreement to accept the same in satisfaction of such debt forms a bar to the recovery of the balance of the debt. This single question was presented to the English court in 1602, when it was resolved (if not decided) in Pinnel's Case (5th Co. R. 117), "that payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the

whole," and that this is so, although it was agreed that such payment should satisfy the whole. This simple question has since arisen in the English courts and in the courts of this country in almost numerous instances, and has received the same solution, notwithstanding the courts, while so ruling, have rarely failed, upon any recurrence of the question, to criticise and condemn its reasonableness, justice, fairness or honesty. No respectable authority that I have been able to find has, after such unanimous disapproval by all the courts, held otherwise than was held in Pinnel's Case (*supra*).

The steadfast adhesion to this doctrine by the *courts* in spite of the current or condemnation by the individual judges *of the Court,* and in the face of the demands and conveniences of a much greater business and more extensive mercantile dealings and operations, demonstrate the force of the doctrine of *stare decisis.* But the doctrine of *stare decisis* is further illustrated by the course of judicial decisions upon this subject, for while the courts still hold to the doctrine of the Pinnel and Cumber and Wane case (*supra*), they have seemed to seize with avidity upon any consideration to support the agreement to accept the lesser sum in satisfaction of the larger, or, in other words, to extract, if possible, from the circumstances of each case a consideration for the new agreement, and to substitute the new agreement in place of the old, and thus form a defense to the action brought upon the old agreement. It will serve the purpose of illustrating the adhesion of the Court to settled law, and at the same time enable us perhaps more satisfactorily to decide whether there was a good consideration in a few of the numerous cases which the courts have held to be sufficient to support the new agreement. * * *

It was held in La Page *v.* McCrea (1 Wend. 164), and in Boyd *v.* Hitchcock (20 Johns. 76), that "giving further security for part of a debt or other security, though for a less sum than the debt and acceptance of it in full of all demands, make a valid accord and satisfaction."

That "if a debtor gives his creditor a note endorsed by a third party for a less sum than the debt (no matter how much less), but in full satisfaction of the debt, and it is received as such, the transaction constitutes a good accord and satisfaction." (Varney *v.* Commey, 3 East. 25). And so it has been held "where by mode or time of part payment, different than that provided for in the contract, a new benefit is or many be conferred or a burden imposed, a new consideration arises out of the transaction and gives validity to the agreement of the creditors," and so if "payment of less than the whole debt, if made before it is due or at a different place from that stipulated, if received in full, is a good satisfaction."

In Watson *v.* Elliott (57 N. H. 511-513), it was held, "it is enough that something substantial, which one party is not bound by law to do, is done by him or something which he has a right to do he abstains from doing at the request of the other party, is held a good satisfaction."

It was held by the Supreme Court of Pennsylvania in Mechanics' Bank *v.* Houston (February 13, 1882, 11 W. Note, case 389), "The decided advantage which a creditor acquires by the receipt of a negotiable note for a part of his debt, is by the increased facilities of recovering upon it, the presumption of a consideration for it, the ease of disposing of it in market," etc., was held to furnish ample reason why it should be a valid discharge of a larger account or open claim unnegotiable.

It has been held that a payment in advance of the time if agreed to is full satisfaction for a larger claim not yet due. (Brooks *v.* White, 2 Met. 283).

In some states, notably Maine and Georgia, the legislature, in order to avoid the harshness of the rule under consideration, have by statute changed the law upon that subject by providing, "no action can be maintained upon a demand which has been canceled by the receipt of any sum of money less than the amount legally due thereon, or for any good and valuable consideration, however small."

And so in Gray *v.* Barton (55 N. Y. 68), where a debt of $820 upon book account was satisfied by the payment of $1 by calling the balance a gift, though the balance was not delivered except by fiction, and the receipt was in the usual form and was silent upon the subject of a gift, and this case was followed and referred to in Ferry *v.* Stephens (66 N. Y. 321).

So it was held in Mitchell *v.* Wheaton (46 Conn. 315), that the debtor's agreement to pay and the payment of $150 with the costs of the suit upon a liquidated debt of $299 satisfied the principal debt. * * *

The general doctrine in Cumber *v.* Wane, and the reason of all the exceptions and distinctions which have been engraved on it, may perhaps be summed upon as follows, viz.: "That a creditor cannot bind himself by a simple agreement to accept a smaller sum in view of an ascertained debt of larger amount, such an agreement being *nudum pactum*. But if there be any benefit or even any legal possibility of benefit to the creditor thrown in, that additional weight will turn the scale and render the consideration sufficient to support the agreement."

In the case at bar the defendants gave their promissory notes upon time for one-half of the debt they owed plaintiff, and also gave plaintiff a chattel mortgage on the stock, fixtures, and other personal property of the defendants under an agreement with plaintiff, to accept the same in full satisfaction and discharge of said indebtedness. Defendants paid the notes as they became due, and plaintiff then discharged the mortgage. Under the cases above cited, and upon principle, this new agreement was supported by a sufficient consideration to make it a valid agreement, and this agreement was by the parties substituted in place of the former. The consideration of the new agreement was that the plaintiff, in place of an open book account for goods sold, got the defendants' promissory notes, probably negotiable in form, signed by defendants, thus saving the plaintiff perhaps trouble or expense of proving their account and got security upon all the defendants' personal property

for the payment of the sum specified in the notes, where before they had no security.

It was some trouble at least, and perhaps some expense to the defendants to execute and deliver the security, and they deprived themselves of the legal ownership, or of any exemptions or the power of disposing of this property, and gave the plaintiff such ownership as against the defendants, and the claims thereto of defendants' creditors, if there were any. * * *

Consideration must be mutual

FRANK E. VOGEL *v.* JOHN PEKOC,
157 Ill. 339 (1895).

Appeal from judgment for plaintiff.

CRAIG, C. J.: This was an action originally brought before a justice of the peace by John Pekoc, against Nelson Morris, Frank E. Vogel and Edward Morris, a firm doing business as Nelson Morris & Company, to recover the sum of $25 for wages claimed to be due as a cooper. On a trial before the justice the plaintiff recovered the amount claimed, and the defendants appealed to the Superior Court of Cook County, where a jury was waived and a trial had before the court, resulting in a judgment for the amount sued for, and also attorney's fees. To reverse this latter judgment the defendants have appealed to this court.

The defendants requested the court to hold the following propositions of law, but the court refused so to hold, and this ruling is relied upon as error:

1. "That the evidence in the case is not sufficient, in law, to sustain a finding for the plaintiff.

2. "That the act providing for attorney's fees in suits for wages, approved June 1 and in force July 1, 1889, is unconstitutional and void.

3. "That the evidence in the case does not show a suit for wages, within the meaning of said act, and that no attorneys' fees can be allowed thereunder."

The evidence shows that plaintiff worked as a cooper for Nelson Morris & Co., and that there was a balance in their hands, for wages unpaid, of $25. The defendants, however, claim that the amount said to be due was forfeited, for the reason that plaintiff quit the services of defendants without giving two weeks' notice, as they claim he was required to do under a contract in writing which they put in evidence, as follows:

"This agreement, made and signed this 12th day of September, 1892, between Fairbank Canning Company and Nelson Morris & Co., the parties of the first part, and John Pekoc, the party of the second part:

"*Witnesseth*, the said parties of the first part agree to employ the said party of the second part to perform such work as they may assign to him from time to time, such service to continue only so long as satisfactory to the said parties of the first part. And in consideration of such employment, and the peculiar nature of the business of the said first parties, and of the wages to be paid by the parties of the first part, the said second party agrees that he will not quit said service and employment without giving two weeks' notice, in writing, to said first parties of his intention so to do, and as a guaranty for the faithful performance of this agreement on his part, the said party of the second part agrees to deposit with said first parties the sum of $25, and in case of the violation of this agreement by said second party the said first parties shall retain said amount as liquidated damages, and in satisfaction and payment of all damages by them sustained. It is further agreed that the said first parties shall retain $2.50 per week of the wages earned by said second party until said sum of $25 shall be in their hands, to be held by them according to the terms of this agreement.

"JOHN PEKOC. (Seal)
_____ (Seal)
_____ (Seal)"

On the other hand, the plaintiff insists that the contract is void for the want of mutuality.

It will be observed that the written contract was not signed by the parties named therein as parties of the first part, and it is insisted by the plaintiff, that as they failed to sign the contract it never became binding on him or any other person. The acceptance of the contract by the parties of the first part, and holding it and acting upon it as a valid instrument, may be regarded as equivalent to its formal execution on their part, as held in Johnson *v.* Dodge, 17 Ill. 433. Regarding the contract in the same way, it would be treated as if it had been signed by the persons named as parties of the first part.

The next question to be determined is whether the contract is mutual. It is a general rule, well understood, that a contract between parties must be mutual. (Weaver *v.* Weaver, 109 Ill. 225); (Tucker *v.* Woods, 12 Johns 190). In the case last cited it is said: "In contracts, where the promise of the one party is the consideration for the promise of the other, promises must be concurrent, and obligatory upon both at the same time." In Chitty on Contracts, the author says: "The agreement, as before observed, must, in general, be obligatory upon both parties. There are several cases satisfactorily establishing, that if the one party never were bound, on his part, to do the act which forms the consideration for the promise of the other, the agreement is void, for want of mutuality." In 1 Wharton on Contracts, page 5, the author says: "The parties to a contract therefore, must both be bound. Supposing that one promise in consideration of the promise of the other, the one is not bound unless the other is bound. A promise to do a thing on an executed consideration is not a contract; nor is a promise to do a thing in consideration of an illegal or impossible engagement on the other side. Without this reciprocal obligation no contract can be constituted. 'It is a general principle,' says Mr. Fry, 'that when, from personal incapacity, the nature of the contract, or any other cause, a contract

is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other party, though its execution in the latter way might in itself be free from difficulty attending its execution in the former.'"

Upon looking into the contract read in evidence, it will be found that the parties of the first part practically agree to do nothing, and there is substantially no obligation imposed upon them by the contract. The only portion of the contract claimed to impose any obligation on the parties of the first part is the following: "The said parties of the first part agree to employ the said party of the second part to perform such work as they may assign to him from time to time, such service to continue only so long as satisfactory to the said parties of the first part." What obligation does this impose? When are they to employ the party of the second part? What sum are they to pay? How long is the employment to continue? Suppose they refuse to employ the party of the second part; can an action for damages be maintained for a breach of the contract? The answer to these inquiries is obvious. We think it is plain that the parties of the first part were not bound, under the terms of the contract, to employ the party of the second part for a single day or hour, and if they had absolutely refused to employ him he was without remedy in any court of the country. It may be true that the plaintiff might have entered into a contract which would require him to give two weeks' notice before he could quit the services of his employer without being liable to respond in damages, as might reasonably be provided in the contract; but no such case is presented by this record. Here the contract imposes no obligation on one of the parties, and hence it is void for the want of mutuality. * * *

The contract being void, it will not be necessary to inquire whether the amount which it was provided might be retained was a penalty or liquidated damages. * * *

MAGRUDER, J., dissented on other points in the case.

Judgment affirmed.

Past consideration and moral obligation

DANIEL MILLS *v.* SETH WYMAN,

3 Pick. (Mass.) 207 (1826).

Appeal from judgment of non-suit.

This was an action of assumpsit brought to recover a compensation for the board, nursing, etc., of Levi Wyman, son of the defendant from February 5th to the 20th, 1821. The plaintiff then lived at Hartford, in Connecticut; the defendant, at Shrewsbury, in this county. Levi Wyman, at the time when the services were rendered, was about twenty-five years of age, and had long ceased to be a member of his father's family. He was on his return from a voyage at sea, and, being suddenly taken sick at Hartford, and being poor and in distress, was relieved by the plaintiff in the manner and to the extent above stated. On February 24th, after all the expenses had been incurred, the defendant wrote a letter to the plaintiff, promising to pay him such expenses. There was no consideration for this promise, except what grew out of the relation which subsisted between Levi Wyman and the defendant, and Howe, J, before whom the cause was tried in the Court of Common Pleas, thinking this not sufficient to support the action, directed a non-suit. To this direction the plaintiff filed exceptions.

PARKER, C. J.: General rules of law established for the protection and security of honest and fair-minded men, who may inconsiderately make promises without any equivalent, will sometimes screen men of a different character from engagements which they are bound in *foro conscientiae* to perform. This is a defect, inherent in all human systems of legislation. The rule that a mere verbal promise, without any consideration, cannot be enforced by action, is universal in its application, and cannot be departed from to suit particular cases in which a refusal to perform such a promise may be disgraceful.

The promise declared on in this case appears to have been made without any legal consideration. The kindness and services toward the sick son of the defendant were not bestowed at his request. The son was in no respect under the care of the defendant. He was twenty-five years old, and had long left his father's family. On his return from a foreign country, he fell sick among strangers, and the plaintiff acted the part of the good Samaritan, giving him shelter and comfort until he died. The defendant, his father, on being informed of this event, influenced by a transient feeling of gratitude, promises in writing to pay the plaintiff for the expenses he had incurred. But he has determined to break this promise, and is willing to have his case appear on record as a strong example of particular injustice sometimes necessarily resulting from the operation of general rules.

It is said a moral obligation is a sufficient consideration to support an express promise; and some authorities lay down the rule thus broadly; but upon examination of the cases we are satisfied that the universality of the rule cannot be supported, and that there must have been some pre-existing obligation, which has become inoperative by positive law, to form a basis for an effective promise. The cases of debts barred by the Statute of Limitations, of debts incurred by infants, of debts of bankrupts, are generally put for illustration of the rule. Express promises founded on such pre-existing equitable obligations may be enforced; there is a good consideration for them; they merely remove an impediment created by law to the recovery of debts honestly due, but which public policy protects the debtors from being compelled to pay. In all these cases there was originally a *quid pro quo;* and, according to the principles of natural justice, the party receiving ought to pay; but the legislature has said he shall not be coerced; then comes the promise to pay the debt that is barred, the promise of the man to pay the debt of the infant, of the discharged bankrupt to restore to his creditor what by the law he had

lost. In all these cases there is a moral obligation founded upon an antecedent valuable consideration. These promises therefore have a sound legal basis. They are not promises to pay something for nothing; not naked pacts; but the voluntary revival or creation of obligation which before existed in natural law, but which had been dispensed with, not for the benefit of the party obliged solely, but principally for the public convenience. If moral obligation, in its fullest sense, is a good substratum for an express promise, it is not easy to perceive why it is not equally good to support an implied promise. What a man ought to do, generally he ought to be made to do, whether he promise or refuse. But the law of society has left most of such obligations to the *interior* forum, as the tribunal of conscience has been aptly called. Is there not a moral obligation upon every son who has become affluent by means of the education and advantages bestowed upon him by his father, to relieve that father from pecuniary embarrassment, to promote his comfort and happiness, and even to share with him his riches, if thereby he will be made happy? And yet such a son may, with impunity, leave such a father in any degree of penury above that which will expose the community in which he dwells to the danger of being obliged to preserve him from absolute want. Is not a wealthy father under strong moral obligation to advance the interest of an obedient, well-disposed son, to furnish him with the means of acquiring and maintaining a becoming rank in life, to rescue him from the horrors of debt incurred by misfortune? Yet the law will uphold him in any degree of parsimony, short of that which would reduce his son to the necessity of seeking public charity.

Without doubt there are great interests of society which justify withholding the coercive arm of the law from these duties of imperfect obligation, as they are called; imperfect, not because they are less binding upon the conscience than those which are called perfect, but because the wisdom of the social law does not impose sanctions upon them.

A deliberate promise in writing, made freely and without any mistake, one which may lead the party to whom it is made into contracts and expenses, cannot be broken without a violation of moral duty. But if there was nothing paid or promised for it, the law, perhaps wisely, leaves the execution of it to the conscience of him who makes it. It is only when the party making the promise gains something, or he to whom it is made loses something, that the law gives the promise validity. And in the case of the promise of the adult to pay the debt of the infant, or the promise of the debtor to pay a debt discharged by the Statute of Limitations or Bankruptcy, the principle is preserved by looking back to the origin of the transaction, where an equivalent is to be found. An exact equivalent is not required by the law; for there being a consideration, the parties are left to estimate its value; though here the courts of equity will step in to relieve from gross inadequacy between the consideration and the promise.

These principles are deduced from the general current of decided cases upon the subject, as well as from the known maxims of the common law. The general position, that moral obligation is a sufficient consideration for an express promise, is to be limited in its application to cases where at some time or other a good or valuable consideration has existed.

A legal obligation is always a sufficient consideration to support either an express or an implied promise; such as an infant's debt for necessaries, or a father's promise to pay for the support and education of his minor children. But when the child shall have attained to manhood and shall have become his own agent in the world's business, the debts he incurs, whatever may be their nature, create no obligation; and it seems to follow, that a promise founded upon such a debt has no legally binding force.

The cases of instruments under seal and certain mercantile contracts, in which considerations need not be proved, do not contradict the principles above suggested. The

first import a consideration in themselves, and the second belong to a branch of the mercantile law, which has found it necessary to disregard the point of consideration in respect to instruments negotiable in their nature and essential to the interests of commerce.

Instead of citing a multiplicity of cases to support the positions I have taken, I will only refer to a very able review of all the cases in the note in 3 B. & P. 249. The opinions of the judges had been variant for a long course of years upon this subject, but there seems to be no case in which it was nakedly decided, that a promise to pay the debt of a son of full age, not living with his father, though the debt were incurred by sickness which ended in the death of the son, without a previous request by the father proved or presumed, could be enforced by action.

It has been attempted to show a legal obligation on the part of the defendant by virtue of our statute, which compels lineal kindred in the ascending or descending line to support such of their poor relations as are likely to become chargeable to the town where they have their settlement. But it is a sufficient answer to his position, that such legal obligation does not exist except in the very cases provided for in the statute, and never until the party charged has been adjudged to be of sufficient ability thereto. We do not know from the report any of the facts which are necessary to create such an obligation. Whether the deceased had a legal settlement in this commonwealth at the time of his death, whether he was likely to become chargeable had he lived, whether the defendant was of sufficient ability, are essential facts to be adjudicated by the court to which is given jurisdiction on this subject. The legal liability does not arise, until these facts have all been ascertained by judgment, after hearing the party intended to be charged.

Judgment affirmed.

Past consideration founded on a previous request

WINEFIELD *v.* FEDER,

169 Ill. App. 480 (1912).

Appeal from judgment for plaintiff.

McSURELY, J.: Samuel W. Winefield, hereinafter called the plaintiff, recovered a judgment against Louis Feder, hereinafter called the defendant, for $500 for commissions claimed under a special verbal contract, whereby the defendant agreed to pay plaintiff said amount if he should secure a purchaser of real estate belonging to the defendant, for $76,000.

It is sought to reverse this judgment for the reason, as it is claimed, that the evidence does not show an enforceable contract or agreement, and hence the trial court should have instructed the jury to find the issues for the defendant.

The evidence shows that the defendant employed plaintiff to procure a purchaser for defendant's property. Plaintiff did so, in the person of B. J. Cahn, who, after some negotiations with the defendant, arrived at an agreement with him as to the price and terms of purchase. At that time the defendant notified plaintiff by telephone that he was closing the deal with Cahn, but that the plaintiff would have to be satisfied with $500 commissions. Plaintiff at first objected and wanted $1,000, but finally agreed to take $500, saying to defendant, "All right; go ahead and close it up. I am satisfied." It was agreed between the defendant and Cahn that Cahn should pay $5,000 down, upon receiving the contract of purchase signed by the defendant and his wife, and defendant took the contract away with him to procure his wife's signature. Nothing further was done in the matter.

These facts clearly establish an agreement by defendant to pay $500 to the plaintiff, and his right to a judgment for the same.

As to the point that a past act cannot serve as a consideration for a promise, it is sufficient to say that the prior

services were rendered at the request of Feder. Our Supreme Court in Carson *v.* Clark, 2 Ill. 113 (114), held: "If the consideration for the promise be past and executed, it can then be enforced only upon the ground that the consideration or service was rendered at the request of the party promising. This request must be averred and proved, or the moral obligation under which the party was placed, and the beneficial nature of the service, must be of such a character that it will necessarily be implied." See also 1 Parsons on Contracts, 468.

There was no reversible error in the rulings of the court upon the admissibility of testimony. The judgment is affirmed.

Editor's Note.—When the services rendered are understood by the parties to be gratuitous, a subsequent promise to pay for the services is without consideration and is unenforceable.—Moore *v.* Elmer, 180 Mass. 15.

"It is stated in the notes to Osbourne *v.* Rogers, 1 Wms. Saunders, 264 b, as a settled rule 'that a past consideration is not sufficient to support a subsequent promise, unless there was a request of the party, express or implied, at the time of performing the consideration; but where there was an express request at the time, it would in all cases be sufficient to support a subsequent promise.' This doctrine seems to have held uniformly ever since the case of Lampleigh *v.* Brathwaite, decided in the reign of James I and reported in 1 Smith's Leading Cases. The case is thus stated: the defendant having feloniously slain one Patrick Mahume required the plaintiff to endeavor to obtain a pardon for him from the king, and the plaintiff journeyed and labored, at his own charges and by every means in his power, to effect the desired object, and the defendant afterwards and in consideration of the premises promised to give the plaintiff £100; it was held that although the consideration was passed and gone before the promise was made, yet inasmuch as the consideration was moved by the previous suit, or request of the party, the promise was binding and capable of sustaining an action. And in another case the plaintiff brought his action upon a promise made by the defendant to pay the plaintiff £20, in consideration that the plaintiff, at the instance of the defendant, had taken to wife the cousin of the defendant; it was held that the action was maintainable, although the marriage was executed and past before the undertaking and promise was made, because the marriage ensued at the request of the defendant.—Bryan, J., in Pool *v.* Horner, 64 Md. 131.

Consideration must be possible

STEVENS *v.* COON,

1 Pinn. (Wis.) 356 (1843).

DUNN, C. J.: Error is brought in this case to reverse a judgment of the District Court of Jefferson County.

Coon, plaintiff below in action of assumpsit against *Stevens,* defendant below, to recover damages on a liability growing out of a contract which is in the words, etc., following, viz.:

"Astor, March 23d, 1839. In consideration of *C. J. Coon* entering the west half of the northwest quarter of section 35, in town. 13, range 13, I bind myself that the said eighty acres of land shall sell, on or before the first October next for $200 or more, and the said *Coon* agrees to give me one-half of the amount over $200, said land may sell for in consideration of my warranty. Hamilton Stevens."

"I agree to the above contract. C. J. Coon."

* * * On the trial, the above contract, and the receiver's receipt to said plaintiff *Coon,* for the purchase money for said tract of land described in said contract, were read in evidence to the jury; and Abraham Vanderpool, a witness, testified "that he had visited that part of the country where the land lies, specified in said writing, and was upon the same, as he has no doubt, and estimated the present value of the same at $150 per acre, and that in October, 1839, it might be worth $125 an acre." Upon this evidence and testimony the plaintiff rested his case.

Under the construction put on the contract read in evidence, the jury found for the plaintiff $116.50, in damages, and judgment was entered thereon. There is manifest error in this decision of the court. From an inspection of the contract, it is obvious that it is not such an one, as is obligatory on either party. There is no reciprocity of benefit, and it binds the defendant below to the performance of a legal impossibility, so palpable to the contracting parties, that it could not have been seriously intended by the parties as obligatory on either. The undertaking of the defendant below is: "that plaintiff's tract of land shall sell for a

certain sum by a given day." Is it not legally impossible for him to perform this undertaking? Certainly, no man can in legal contemplation, force the sale of another's property by a given day, or by any day, as of his own act. The plaintiff was well apprised of the deficiency of his contract on the trial, as the testimony of his witness was entirely apart from the contract sued on, and was directed in part to a different contract; and such an one as the law would have recognized. If the contract had been that the tract of land would be worth $200 by a given day, then it could have been recovered on, if it did not rise to that value in the time. The district court should not have entered judgment on the finding of the jury in this case. The construction of the contract by the district court was erroneous.

Judgment reversed with costs.

Failure of consideration

WESTERVELT, RESPONDENT, *v.* FULLER MFG. CO., APPELLANT,

13 Daly N. Y. 352 (1885).

Appeal from a judgment for defendant.

LARREMORE, J.: This action was brought by the plaintiff to recover upon an alleged contract to pay him one hundred dollars for all his right and interest in a certain invention, he to sign all papers necessary to secure the patent.

The agreement commenced with the following recital: Whereas I am the inventor of "certain improvements in monkey wrenches." Five dollars were paid on the execution of the contract, by which it was stipulated that the further sum of ninety-five dollars should be paid thereafter.

The plaintiff further agreed to sign all papers necessary to secure a patent for the invention, and to request and authorize the Commissioner of Patents to issue such letters patent unto the defendant, and to do all else that would be necessary to vest the title in said invention in the defendant.

No patent was ever obtained for the invention; and as appears from the evidence, none could be obtained, for the reason that an earlier patent for the same invention had been issued to another party.

If a patent had been issued upon the plaintiff's alleged invention, and the defendant had acted upon it, he would not have been allowed to question its legality, under the rulings in Smith *v.* Standard Laundry Mach. Co. (11 Daly 156); Union Manuf. Co., of Norwalk *v.* Lounsbury (41 N. Y. 363).

It is apparent from the testimony in this case that the patentability of the invention was the consideration of the agreement referred to, and such patent not having been issued, there was a total failure of the consideration of the contract, which the plaintiff has never fully performed. For this reason, I think the judgment appealed from should be affirmed.

Having reached this conclusion, it is unnecessary to consider the other points raised in the case.

Judgment affirmed, with costs.

Editor's Note.—An agreement to convey lands in consideration of certain slaves was made in 1863, and the vendor of the lands took a bill of sale of the slaves, executed by all the owners but one, who was a minor, and took possession of the slaves, and permitted the vendees to take possession of the lands, agreeing to convey as soon as the minor became of age, and conveyed to him his interest in the slaves. Before the minor became of age, the slaves were emancipated by the thirteenth amendment to the United States Constitution. *Held*, that the vendor was not entitled to recover the lands from the vendees, because of a failure of consideration.—Calloway *v.* Hamby, 65 N. C. 631 (1871).

Chapter III

CAPACITY OF PARTIES

CONTRACTS OF INFANTS

Infants' contracts for necessaries

TUPPER *v.* CADWELL,

53 Mass. 559 (1847).

The plaintiff claimed of the defendant payment for labor done and materials furnished in rebuilding and repairing house $300. The defendant filed a plea stating among other things that he was an infant. The jury found a verdict for the plaintiff for $300. * * * Upon being inquired of by the court, they stated that they had found the defendant to be a minor when the work was done, and that the whole of the plaintiff's work and materials were necessary. The defendant excepted.

DEWEY, J.: An infant may make a valid contract for necessaries; and the matter of doubt in the present case, is that what expenditures are embraced in the term "necessaries." In Co. Lit. 172 A. it is said, "An infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessaries and likewise for his good teaching or instruction, whereby he may profit himself afterwards." The term necessaries, it is well settled, also embraces articles for the support of his wife and children, if he has such to maintain. The wants to be supplied are, however, personal, either those for the body as food, clothing, lodging or the like; or those necessary for the proper cultivation of the mind, an instruction suitable and requisite to the useful development of the intellectual powers, and qualifying the individual to engage in business when he shall arrive at the age of manhood. * * *

No authority has been found, which in our opinion, sustains the position that a minor is liable for expenditures upon his real estate, of the character and under the circumstances here stated. No necessity can exist for such expenditures, solely upon the credit of the minor. The fact that he has real estate which may require supervision, and may need repairs furnishes the proper occasion for the appointment of a guardian through whose agencies such repairs can be made, and, as the law assumes, more judiciously made, than through the agency of the minor. An infant is not liable for goods bought to furnish his shop, and to enable him usefully to continue trade, although he keeps a public shop. Whittingham *v.* Hill Cro. Jac. 494. In such cases, the law deems the infant incompetent to carry on business, and for that reason holds him not liable for articles furnished him for trade, irrespective of the questions whether, in the particular state of his business the addition to his stock was actually beneficial. That question is not open, in such cases. We think a similar rule prevails as to expenditures for improvements upon the real estate of a minor. The law deems him incompetent to make such contracts; and they not being of the class embraced in the term "necessaries," no legal liability arises for such expenditures, as against the infant personally. * * *

New trial ordered.

Voidable contracts of infants

JOHNSON *v.* LINES,

6 W. & S. 80 (1843).

Appeal from judgment for plaintiffs.

This was an action on contract by Lines and Scott against the administrator of John Johnson. The declaration contained the common money counts; to which the defend-

ant pleaded infancy at the time of the supposed promise, and the plaintiffs replied that the goods provided were necessaries. The defendant asked the court to charge, "That the plaintiffs had no right to deal with the minor even for necessaries unless the guardian refused to furnish him with them." The court charged "that the plaintiffs had no right to deal with the deceased unless by the *permission,* express *or* implied, of the guardian; *or* unless the guardian refuses to furnish necessaries to his ward." * * * Verdict and judgment for the plaintiffs.

GIBSON, C. J.: The case of the plaintiffs below is poor in merits. It appears that they supplied a young spendthrift with goods which they call necessaries, but which ill deserve the name. Their account amounts up to more than a thousand dollars, comprising charges for many articles which might be ranked with necessaries when supplied in reason; but not at the rate of twelve coats, seventeen vests, and twenty-three pantaloons, in the space of fifteen months and twenty-one days; to say nothing of three bowie knives, sixteen penknives, eight whips, ten whip-lashes, thirty-nine handkerchiefs, and five canes, with kid gloves, fur caps, chip hats and fancy bag, to match. Such a bill makes one shudder. Yet the jury found for the plaintiffs almost their whole demand, including sums advanced for pocket money, and to pay for keeping the minor's horses, which no one would be so hardy as to call necessaries. How they could reconcile such a vedict to the dictates of conscience, I know not. They surely could not complacently look upon the ruin of their own sons, brought on by ministering to their appetites, and stimulating them with the means of gratification. Every father has a deeper stake in these matters than the public mind is accustomed to suppose; and it intimately concerns the cause of morality and virtue, that the rule of the common law on the subject be strictly enforced. The minor was at the critical time of life when habits are formed which make or mar the man—which fit him for a useful life, or send him to an untimely grave; and public policy

demands that they who deal with such a customer, should do so at their peril. This enormous bill was run up at one store; and what other debts were contracted for supplies elsewhere, we know not; but let it not be imagined that the infant's transactions with other dealers did not concern the plaintiffs. "With a view to quantity, and quantity only," said Baron Alderson, in Burghart *v.* Angerstein (6 Car. & P. 700), "you may look at the bills of the other tradesmen by whom the defendant was also supplied; for if another tradesman had supplied the defendant with ten coats, he would not then want any more, and any further supply would be unnecessary. If a minor is supplied, no matter from what quarter, with necessaries suitable to his estate and degree, a tradesman cannot recover for any other supply made to the minor just after." And the reason for it is a plain one. The rule of law is, that no one may deal with a minor; the exception to it is, that a stranger may supply him with necessaries proper for him, in default of supply by any one else; but his interference with what is properly the guardian's business must rest on an actual necessity, of which he must judge, in a measure, at his peril. In Ford *v.* Fothergill (1 Esp. R. 211; S. C. Peake's N. P. C. 299), Lord Kenyon ruled it to be incumbent on the tradesman, before trusting to an appearance of necessity, to inquire whether the minor is provided by his parent or friends. That case may be thought to have been shaken in Dalton *v.* Gib (5 Bing. N. C. 198) in which it was held that inquiry is not a condition precedent to recovery where the goods seemed to be necessary from the outward appearance of the infant, though the mother was at hand and might have been questioned; but in Brayshaw *v.* Eaton (Id. 231) this was explained to mean that, as such an inquiry is the tradesman's affair, being a prudential measure for his own information, the omission of it is not a ground of non-suit, but that the question is, on the fact put in issue by the pleadings, whether the supply was actually necessary. It is the tradesman's duty to know, therefore, not only

that the supplies are unexceptionable in quantity and sort, but also that they are actually needed. When he assumes the business of the guardian for purposes of present relief, he is bound to execute it as a prudent guardian would, and, consequently, to make himself acquainted with the ward's necessities and circumstances. The credit which the negligence of the guardian gives to the ward ceases as his necessities cease; and, as nothing further is requisite when these are relieved, the exception to the rule is at an end. In this case the supply of articles which were proper in kind was excessive in quantity. I impute no intentional wrong to the plaintiffs, for they dealt with the intestate, as others may have done, evidently supposing him to be *sui juris;* but I certainly do blame the jury for finding nearly the whole demand, after it had been conceded that he was an infant. * * *

Judgment reversed and new trial awarded.

Executed contracts of infants

RICE, BY HER GUARDIAN, *ad litem,* RESPONDENT, *v.* WM. BUTLER,

160 N. Y. 578 (1899).

HAIGHT, J.: The appeal in this case is based upon the certificate of the appellate division to the effect that questions of law are involved which ought to be reviewed by this court. The action was brought in the Municipal Court

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Editor's Note.—Although the articles supplied to an infant may be of the nature of necessaries, yet if the infant is already supplied with such articles, he can not be compelled to pay for the additional ones, and it is immaterial whether or not the person supplying the articles knew of the existing supply. The amount which may be recovered for necessaries supplied to an infant is limited to their fair and reasonable value regardless of what the infant may have agreed to pay for them. 22 Cyc. 596, 598.

of Syracuse to recover the sum of $26.25 paid by the plaintiff, a minor, 17 years of age, upon a contract for the purchase of a bicycle. The contract price was $45; $15 were paid upon the execution of the contract, and the remainder was to be paid in weekly instalments of $1.25. The plaintiff purchased the wheel in June and used it until about the 20th of September, and then returned it to the defendant, asserting that she had been defrauded, and demanding repayment of the amount that she had paid upon the contract. The defendant took the wheel, but refused to return the money, claiming that the use of the wheel and its deterioration in value exceeded the sum paid. Upon the trial evidence was submitted on behalf of the defendant tending to show that the use of the wheel and its deterioration in value equaled or exceeded the amount that had been paid upon the contract. The trial court found in favor of the defendant, thus establishing the fact that there had been no fraud on the part of the defendant in making the contract.

It is now contended that the contract was executory, and that, being such, the plaintiff had the right to rescind and recover back the amount paid. The Appellate Division appears to have taken this view of the case, and has reversed the judgment. The question thus presented may not be free from difficulty. There are numerous authorities bearing upon the question, but they are not in entire harmony. * * * The contract in this case in its entirety must be held to be executory; for, under its terms, payments were to mature in the future and the title was only to pass to the minor upon making all of the payments stipulated; but insofar as the payments made were concerned, the contract was in a sense executed, for nothing further remained to be done with reference to those payments. Kent in his Commentaries (Vol. 2, page 240) says: "If an infant pays money on his contract and enjoys the benefit of it, and then avoids it when he comes of age, he cannot recover back the consideration paid. On the other hand, if he avoids an executed contract when he comes of age on the ground of infancy, he must restore the consideration which he had received. The privilege of infancy is to be used as a shield, and not as a sword. He

cannot have the benefit of the contract on one side without returning the equivalent on the other."

In the case of Grey *v.* Lessinglon (2 Bosw. 257) a young lady during her minority had purchased a quantity of household furniture, paying about half of the purchase price, and had given her note for the balance. She subsequently rescinded the contract and sought to recover the amount that she had paid. She had had the use of the furniture in the meantime, and it was held that she must account for its deterioration in value. Woodruff, J., in delivering the opinion of the court, says: "When it becomes necessary for an infant to go into a court of equity, to cancel her obligations or regain the pledge given for their performance, seeking equity, she must do equity. Making full satisfaction for the deterioration of the property, arising from its use, is doing no more. Presumptively, she has derived from the use of the property a profit or benefit equivalent to such deterioration."

In the case of Medbury *v.* Watrous (7 Hill 110) an action was brought by an infant to recover for services performed, of the value of $70. The defense was that the work was done in part performance of a covenant to purchase of the defendant a house and lot for the sum of $600. He had not entered into the possession of the house and lot and had received no benefits from the purchase. It was held that he could rescind the contract, and, having received nothing under it, he could recover upon a *quantum meruit* for the work performed. Beardsley, J., delivering the opinion of the court, refers to the rule laid down by Chancellor Kent, and then to the case of Holmes *v.* Blogg (8 Taunt. 508), and says, with reference to the latter case: "It was not shown what had been the value of the use of the premises demised while the infant remained in possession. If that was less than the sum paid by him, it may well be that he ought to have recovered the difference." It will thus be seen that the cases to which we have alluded recognize the principle which we think ought to be applied to this case, and that is that the plaintiff, having had the

use of the bicycle during the time intervening between her purchase and its return, ought, in justice and fairness, to account for its reasonable use or deterioration in value. Otherwise she would be making use of the privilege of infancy as a sword and not as a shield. In the absence of wanton injury to the property, the value of the use would be deemed to include the deterioration in value, and under the evidence in this case, as found by the trial court, the use equaled the sum paid. Our attention has been called to the case of Pyne *v.* Wood (145 Mass. 558), but we think the rule suggested by us is more equitable and that it should not be followed.

Judgment of the Appellate Division is reversed.

Effect of disaffirmance

CARR *v.* CLOUGH,
26 N. H. 280 (1853).

Trover for a horse. It appeared in evidence that the plaintiff and the defendant exchanged horses, and that upon the exchange the plaintiff, a minor, being the owner of the horse in question, delivered the same to the defendant in exchange for a mare, which the defendant delivered to the plaintiff; the defendant at the same time agreeing to pay plaintiff the sum of $10 on the following day. On the Monday next after the exchange the plaintiff told the defendant he wanted to trade back, and the defendant said

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Editor's Note.—In Gillis *v.* Goodwin (180 Mass. 140) an infant had purchased a bicycle on time payments. After using the bicycle for some time, he disaffirmed the contract and sued for the money he had paid. It was held that he could recover and that the defendant was not entitled to anything for the rent and use of the bicycle while it was being used by the plaintiff. This rule which is contrary to Rice *v.* Butler, is followed in many jurisdictions.

he would not do it unless the plaintiff would pay him $15. The defendant then told the plaintiff that he would come up the next morning and pay the boot, but he did not do it. About three months later the plaintiff went to the house of the defendant, taking the mare with him, and offered to return her to the defendant, and informed him that he would not abide by the trade, and requested the defendant to deliver him the horse in controversy. But the defendant refused to do it, saying that he would not let him have the horse, and would not receive back the mare. The mare was at that time in good condition, and of as great value as at the date of exchange. The defendant had sold the horse before the conversation last above mentioned. Verdict for plaintiff. It was agreed that judgment should be rendered on the verdict or the verdict set aside and new trial granted, according to the opinion of the court.

EASTMAN, J.: * * * If the subject of the sale be personal property, and a delivery to and possession by, the vendee follows, and there are no legal means to regain the property till the minor arrives at full age, so as to decide whether he will ratify the contract or not, the property may all be wasted and gone beyond recovery, and in many cases for a very inadequate consideration. In such cases the principle of protection would be of little use could it not be exercised before maturity. We lay down the rule, then, that a sale and delivery of personal property by a minor, for a good consideration, but made without fraud by him, may be rescinded by the minor before arriving at full age (Stafford *v.* Roof, 9 Cow. 629, etc.), but if the infant rescinds the contract and seeks to recover the article sold by him, he must restore the property or consideration received before he can maintain his action for the property sold. This is but even-handed justice, and the contrary doctrine would oftentimes enable the infant to use his minority for the perpetration of gross fraud. * * *

Badger *v.* Finney, 15 Mass. 363, was replevin, and the precise point decided was this: that where goods are sold to an infant on a credit and he avails himself of his infancy

to avoid a payment, the vendor may reclaim the goods as having never parted with his property to them. In Fitz *v.* Hall (9 N. H. 441) it was held that if an infant disaffirms a contract by which goods have been sold to him, if he has the goods in his possession and refuses to deliver them to the vendor upon a demand for that purpose, trover may be maintained against him for the conversion. The same case also lays down the principle that where the property is passed from the hands of the infant, trover will not lie, although if there has been fraud practiced by the infant a special action on the case may be sustained. The doctrine upon this point is gathered from the weight of authority, and which seems to be founded in good reason, appears to be this: First, that the infant shall not be permitted to rescind his contract and recover the articles parted with by him without first restoring the property or consideration received therefor. Second, that in case of sale by an adult to an infant, if the adult demands the payment or consideration promised by the infant, and he disaffirms the contract and refuses payment, or if suit be brought against him, pleads infancy and avoids the debt, the adult may thereafter, in case the property be in the infant's possession, maintain replevin therefor, or demand the property, and upon refusal bring trover and recover its value. If, however, the infant has parted with possession of the property sold him, the adult is remediless, provided there has been no fraud practiced. It follows also in the absence of fraud where the contract is fully executed that until the same is rescinded the adult has the right to property which he has received, and has the right to make a bona fide sale of the same before the rescission.

Judgment on the verdict.

Editor's Note.—An infant's contracts are as a rule merely voidable. The right to avoid is personal to the infant, or his guardian, or his personal representatives after his death. The adult can not avoid a contract on account of the other's infancy.

The time for avoidance by an infant, of sales, mortgages or other transactions affecting realty, is after his arrival at majority. As to transactions in relation to personal property the disaffirmance may be effected as well before as after majority. Disaffirmance may be either express or implied.

On the other hand an infant may ratify a contract made during infancy when he reaches his majority. Ratification likewise may be either express or implied. 22 Cyc. 503 et seq.

Return of consideration after disaffirmance

SAMUEL CHANDLER & ANOTHER *v.* CHAS. N. SIMMONS,

97 Mass. 508 (1867).

Writ of Entry in behalf of Samuel Chandler and John E. Chandler, as tenants in common, by their guardian, Weston Earle, to recover a tract of land in Dighton. Plea, *nul disseisin,* with an averment of title in the tenant.

WELLS, J.: These exceptions bring up the instructions under which the right of John E. Chandler to recover certain land was submitted to the jury. The defense was based upon a conveyance made by John E. Chandler while a minor, and ratified by him after he became of age. No question is made but that he is completely divested of his title, unless the pendency of proceedings against him as a spendthrift deprived him of the right to confirm his deed.

A deed obtained by undue influence, though voidable only by the party wronged, may be avoided by a guardian afterwards appointed. Somes *v.* Skinner, 16 Mass. 348. The rights of the ward are to be asserted in his own name, but upon the appointment of a guardian all discretion as to their exercise is taken from the ward and thenceforward intrusted to the guardian. A spendthrift under guardianship cannot even make an acknowledgment that will take his debt out of the statute of limitations. But his guardian may bind the estate of the ward by such an acknowledgment. Manson *v.* Felton, 13 Pick. 206-211. This is not denied as a general proposition, but it is contended that the right of a minor to avoid or affirm his deed stands upon a different footing; that it is a personal privilege, to be exercised only by the minor himself. The case of Oliver *v.* Houdlet, 13 Mass. 237-240, is cited as authority to the point that the guardian of a minor cannot avoid his deed on the ground of minority. If that be so, it must be for the reason that the election, whether to avoid or affirm,

is reserved to the minor until he shall be of age, and that a previous determination of his right by the guardian would be inconsistent with such a privilege in the ward. It has, indeed, sometimes been held that the minor himself cannot avoid his deed until he is of age. Bool *v.* Mix, 17 Wend. 119. It is undoubtedly true that he cannot affirm it till then. But it is at least questionable whether he can be deprived of the right to re-enter or recover his property by suit while his minority continues. After he is of full age, if unable to exercise his privilege, by reason of mental or legal capacity, it seems reasonable and consistent with the nature and purpose of this right that it should be exercised for him and in his name by the guardian who may have charge of his interests. Otherwise he might be remediless for most serious impositions, as he can do no legally valid act himself. The right may be asserted by heirs, and we cannot doubt that it may be also by a guardian appointed over his property for any cause for which adult persons are placed under guardianship.

Upon the second point it is urged that the deed of a minor may be confirmed by a mere waiver of the right to avoid, or by implication from his acts, or even from his neglect to exercise the right, and therefore that the confirmation of a deed, by which the title and seisin have already passed to the grantees, is not a contract nor a sale or transfer of real estate within the meaning of the statute. To this it may be answered that even a ratification by waiver, or implied from acts or from omission to avoid, requires in the party, whose right is thus determined, a mental and legal capacity to exercise the right and to bind himself by such act or omission to act. But the question here does not turn upon the precise designation to be given to the confirmation of a deed in the modes suggested. It relates to positive agreements or acts of release or waiver, by which the party deprives himself and those representing him of all right thereafter to avoid the deed and re-enter upon the estate. Such acts are certainly in the nature of contract,

and require all the elements of a contract (except a new consideration) to give them effect. * * *

Another ground relied on by the defendant is that the deed cannot be avoided without a return of the consideration. We do not understand such a condition is ever attached to the right of a minor to avoid his deed. If it were so, the privilege would fail to protect him when most needed. It is to guard him against the improvidence which is incident to his immaturity that this right is maintained. If the minor, when avoiding his contract, have in his hands any of its fruits specifically, the act of avoiding the contract by which he acquired such property will divest him of all right to retain the same; and the other party may reclaim it. He cannot avoid in part only, but must make the contract wholly void if at all, so that it will no longer protect him in the retention of the consideration. Badger *v.* Phinney, 15 Mass. 359. Or if he retain and use or dispose of such property after becoming of age, it may be held as an affirmance of the contract by which he acquired it, and thus deprive him of the right to avoid. Boyden *v.* Boyden, 9 Met. 519. But if the consideration has passed from his hands, either wasted or expended during his minority, he is not thereby to be deprived of his right or capacity to avoid his deed, any more than he is to avoid his executory contracts. And the adult who deals with him must seek the return of the consideration paid or deliver to the minor in the same modes and with the same chances of loss in the one case as in the other. Dana *v.* Stearns, 3 Cush. 372-376. It is not necessary, in order to give effect to the disaffirmance of the deed or contract of a minor, that the other party should be placed in statu quo. Tucker *v.* Moreland, 10 Pet. 65-74.

Upon the case as stated in the exceptions we are of opinion that the attempt of John E. Chandler to ratify his deed was ineffectual, and that it may be avoided now by his guardian without the previous return, or the offer to

return, the consideration paid herefor. The ruling of the Superior Court appears to have been otherwise, and therefore these exceptions must be sustained.

Exceptions sustained.

Liability of infants for deceit

RICE *v.* BOYER,

108 Ind. 472 (1886).

Appeal from judgment for defendant on demurrer.

ELLIOTT, C. J.: It is alleged in the complaint of the appellant that the appellee, with intent to defraud the appellant, falsely and fraudulently represented that he was twenty-one years of age; that, relying upon this representation, the appellant was induced to sell and deliver to the

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Editor's Note.—The law regarding the right of an infant to avoid his contracts is uniform in all states on some points, but differs in many states on others:

(*a*) AS REGARDS NECESSARIES

1. All authorities agree that an infant may disaffirm an executory contract to purchase necessaries.

2. Almost all authorities agree that an infant is bound on his executed contracts for necessaries, that is he must pay for necessaries actually supplied, or if he has paid for them he may not avoid the contract and recover the price. This rule has been changed in Pennsylvania where the statute provides that "where necessaries are sold and delivered to an infant he must pay a reasonable price therefor *or return the goods in substantially the same condition as when received, within a reasonable time.*"

(*b*) AS REGARDS CONTRACTS OTHER THAN FOR NECESSARIES

1. All authorities agree that an infant may disaffirm and avoid any purely executory contract.

Illustration.—An infant agrees to subscribe for stock in a corporation to be formed. When demand is made upon him to meet his subscription he may disaffirm and resist an action for the price.

2. Most authorities agree that an infant may disaffirm a contract in which he has received the consideration, but which has not been executed by him. In other words he may use infancy as a defense to avoid the enforcement of a contract against him. In such a case, he must upon disaffirmance return the consideration, if he has it, but if he has wasted it he may disaffirm without the return thereof.

Illustration.—An infant purchases an automobile on credit and wears it out in pleasure riding. When sued for the price his plea of infancy is a complete defense.

3. Most authorities agree that an infant may avoid his executed contracts if he can put the other party in statu quo.

Illustration.—An infant exchanges his automobile for a horse. In such a case he can by returning the horse, compel the return of his automobile.

4. Authorities are not agreed as to whether an infant can avoid an executed contract and recover his consideration when he can not put the other party in statu quo. In regard to contracts affecting real estate the cases almost uniformly hold that he may disaffirm them regardless of whether or not he can return the consideration, as in Chandles *v.* Simmons, supra. Many authorities hold a similar rule concerning all executed contracts. The case of Rice *v.* Butler, supra, holds the contrary and while it is not given as a final authority, it is thought to be a well considered case on the point. See 22 Cyc. 503 et seq.

appellee, on one year's credit, a buggy and a set of harness, and that the appellee's representation was untrue.

To this complaint a demurrer was sustained, and error is assigned on that ruling. * * *

The material and controlling question in the case is this: Will an action to recover the actual loss sustained by a plaintiff lie against an infant who has obtained property on the faith of false and fraudulent representation that he is of full age?

Infants are, in many cases, liable for torts committed by them, but they are not liable where the wrong is connected with a contract, and the result of the judgment is to indirectly enforce the contract. Judge Cooley says: "If the wrong grows out of contract relations, and the real injury consists in the non-performance of the contract into which the party wronged has entered with an infant, the law will not permit the former to enforce the contract indirectly by counting on the infant's neglect to perform it or omission of duty under it as a tort." * * *

"So if an infant effects a sale by means of deception and fraud, his infancy protects him." Cooley Torts 106, 107. Addison, following the English cases, says an infant is not liable "if the cause of action is grounded on matter of contract with the infant, and constitutes a breach of contract, as well as a tort." Addison Torts, 1,314. Upon this principle it has been held in some of the cases that an infant is not liable for the value of property obtained by means of false representations. * * *

It is also firmly held that an infant is not estopped by the false representation as to his age; but this doctrine rests upon the principle that one under the disability of coverture or infancy has no power to remove the disability by the representation. Carpenter *v.* Carpenter, 45 Ind. 142. * * *

Our judgment is that where an infant does fraudulently and falsely represent that he is of full age he is liable in an action *ex-delicto* for the injury resulting from his tort. This result does not involve a violation of the principle that an

infant is not liable where the consequences would be an indirect enforcement of his contract, for the recovery is not upon the contract, as that is treated as of no effect; nor is he made to pay the contract price of the article purchased by him, as he is only held to answer for the actual loss caused by his fraud. In holding him responsible for the consequences of his wrong an equitable conclusion is reached, and one which strictly harmonizes with the general doctrine that an infant is liable for his torts. Nor does our conclusion invalidate the doctrine that an infant has no power to deny his disability, for it concedes this, but affirms that he must answer for his positive fraud.

Our conclusion that an infant is liable in tort for the actual loss resulting from a false and fraudulent representation of his age is well sustained by authority, and it is strongly entrenched in principle, although, as we have said, there is a fierce conflict. * * *

There are many cases, far too numerous for citation, where there is some connection between the contract and the tort, and yet it is unhesitatingly held that the infant is liable for his tort. Cooley Torts, 112. The cases certainly do agree. It is, indeed, difficult, if not impossible, to perceive how it could be otherwise that, although there may be some connection between the contract and the wrong, the infant may be liable for his tort. It seems to us that the only logical and defensible conclusion is that he is liable to the extent of the loss actually sustained for his tort, where recovery can be had without giving effect to his contract. The test, and the only satisfactory test, is supplied by the answer to the question: Can the infant be held liable without directly or indirectly enforcing his promise? There is no enforcement of promise where an infant who has been guilty of a positive fraud is made to answer for the actual loss his wrong has caused to one who has dealt with him in good faith and has exercised due diligence. * * *

It may often happen that the age and appearance of the infant will be such as to preclude a recovery for a fraud,

because reasonable diligence which is exacted in all cases, would warn the plaintiff of the non-age of the defendant. On the other hand, the infant may be in years almost of full age, and in appearance entirely so, and thus deceive the most diligent by his representations. Suppose a minor, who is really twenty years and ten months old, but in appearance a man of full age, should obtain goods by falsely and fraudulently representing that he is twenty-one years of age, ought he not, on the plainest principles of natural justice, to be held liable, not on his contracts, but for a loss occasioned by his fraud?

The rule which we adopt will enable courts to protect, in some measure, the honest and diligent, but none other, who are misled by a false and fraudulent representation, and it will not open the way to imposition upon infants, for, in no event, can anything more than the actual loss sustained be recovered, and no person who trusts, where fair dealing and due intelligence require him not to trust, can reap any benefit. It will not apply to an executory contract which an infant refuses to perform, for, in such a case, the action would be on the promise, and the only recovery that could be had for the breach of contract, and the terms of our rule forbid such a result, but it will apply where an infant, on the faith of his false and fraudulent representation obtains property from another and then repudiates his contract. * * * We are unwilling to sanction any rule which will enable an infant who has obtained the property of another, by falsely and fraudulently representing himself to be of full age, to enjoy the fruits of his fraud, either by keeping the property himself or selling it to another, and when asked to pay its just and reasonable value successfully plead his infancy. Such a rule would make the defense of infancy both a shield and a sword, and this is a result which the principles of justice forbid, for they require that it should be merely a shield of defense.

Judgment reversed, with instructions to overrule the demurrer to the complaint.

Editor's Note.—Infancy is no defense to an action of tort for assault, breach of trust, conversion, embezzlement, libel, slander, negligence, trespass, etc. 22 Cyc. 619.

CONTRACTS OF PERSONS MENTALLY DEFICIENT

What constitutes mental incapacity—Insanity

EUROPE A. LILY, APPELLANT, *v.* GEORGE WAGGONER, CONSERVATOR OF ELISHA WAGGONER, APPELLEE.

27 Ill. 395 (1862).

Appeal from decree for complainant.

This suit was commenced by a bill in chancery, by George Waggoner as conservator of the estate of Elisha Waggoner, for the purpose of setting aside a conveyance of real estate made by Elisha Waggoner to the appellant, Lily, in 1851, upon the ground that said Elisha was insane at the time of selling and conveying the property.

The bill alleges that, in 1858, an inquest was held upon said Elisha Waggoner, and George Waggoner appointed as conservator of the estate of Elisha Waggoner, and that for a long period previous to the inquest, said Elisha was insane, and that during such insanity he conveyed the land described in the bill to Lily. Lily's answer admitted the conveyance and alleged that a full consideration was paid for the land; that he, Lily, is in possession of the land, * * * and that the said Elisha was not insane at the time of making the conveyance, but legally competent to make it.

WALKER, J.: Does the evidence in this case establish the fact that Elisha Waggoner was of non-sane mind, so as to avoid his conveyance to appellant? It may be truly said that there are few questions which present greater difficulties in their solution than those of insanity. It assumes such a variety of forms, from that of a raving mad man to the monomaniac; from total dementia, to that of scarcely perceptible insanity, that it has almost been denied, that any person is perfectly sane, on any subject. But the law only regards it, when it renders the subject *non com-*

pos mentis, or that condition of the mental faculties exists which renders the subject incapable of acting rationally in the ordinary affairs of life. It is that degree of mental derangement which renders the person affected incapable of understanding the effect and consequences of his acts. It need not be of that total derangement, or rather obliteration of the faculties, which prevents the party from reasoning upon all subjects. Nor yet the want of power at all times upon correct premises, to arrive at accurate conclusions, but it is that want of power which prevents a person from reasoning, or understanding the relation of cause and effect.

Persons of equal natural mental capacity from difference in education, pursuits and opportunity manifest different degrees of mental vigor. The law has never required the high order of reasoning powers that mark the gifted, or a large portion of the human family would be thus deprived of the legal capacity to transact their own business. But if the person manifest an ordinary degree of intelligence and judgment, or even less, in reference to his business pursuits, and especially upon the subject in dispute, at the time of transaction, it is all that is required.

A person may be a lunatic, and yet have lucid intervals, and the law has, at all times, held that a contract entered into, during a lucid period, is valid, while those made during a fit of insanity may be avoided. The reason is obvious, as a contract to be binding, must receive the assent of the parties. Not mere formal assent, but the agreement of a mind capable of comprehending the nature of the transaction. Where one of the parties is *non compos mentis* he has not entered into the agreement, because his mind has not comprehended the nature of the transaction, or the effect of his act. He lacks the mental capacity to understandingly give his assent to the transaction, while in a lucid interval, his mind acting with judgment, has understood the force and effect of his act. * * *

The legal presumption is that all persons of mature age are of sane memory. But after inquest found, the pre-

sumption is reversed until it is rebutted by evidence that he has become sane. When a transaction complained of occurred before the inquest is had, the proof of insanity devolves upon the party alleging it, but it is otherwise if it took place afterwards. In this case the conveyance was executed several years previous to the inquest, and the legal presumption is that the deed is valid unless the proof establishes insanity at the time of its execution. * * *

It appears to us that the evidence, on the part of the complainant, fails to establish the fact that the grantor was insane when the deed was executed. It may create doubt, but that is insufficient to overcome the presumption of sanity. To have that effect the evidence must preponderate, but if this were not so, appellant introduced eight witnesses, acquaintances of Waggoner, who saw and conversed with him, but at no time discovered any appearance of insanity, of which complainants' witnesses speak. Some of them purchased of him land or other property, but saw nothing to induce them to believe him insane. It appears that, immediately previous to the sale, Waggoner went, on two different occasions, to the houses of one of the witnesses for the purpose of selling the land to appellant; that he then appeared to be rational. Noys testifies that he purchased of him a piece of land in April, 1851; had sold him goods, and had seen nothing strange or unusual in his conduct, and believed him to be competent to trade and make contracts at the time. This witness says "he was about like the other Waggoners;" was always somewhat singular from the time he first knew him.

Decree reversed and bill dismissed.

Contractual power of persons lacking mental capacity

GRIBBEN *v.* MAXWELL,

34 Kan. 8 (1885).

This action was brought by Noah Gribben as guardian of Olive Gribben, a lunatic, against Maxwell to set aside a conveyance executed by Olive Gribben.

HORTON, C. J.: As a general rule, the contract of a lunatic is void *per se,* the concurring assent of two minds is wanting. "They who have no mind cannot concur in mind with one another; and as this is the essence of a contract, they cannot enter into a contract." Powell *v.* Powell, 18 Kas. 371. Notwithstanding this recognized doctrine, decided cases are far from being uniform on the subject of liability or extent of liability of lunatics for their contracts. * * * We think, however, the weight of authority favors the rule that where a purchase of real estate from an insane person is made, and a deed of conveyance is obtained in perfect good faith before the inquisition and finding of lunacy, for a sufficient consideration, without knowledge of the lunacy and no advantage is taken by the purchaser, a consideration received by the lunatic must be returned, or offered to be returned, before the conveyance can be set aside at the suit of the alleged lunatic or one who represents him.

In Corbett *v.* Smith, 7 Iowa 60, the court states the law as follows: "In the next place a distinction is to be borne in mind between contracts *executed* and contracts *executory.* The latter the courts will not in general lend their aid to execute where a party sought to be affected was at the time incapable, unless it may be for necessaries. If, on the other hand, the incapacity was unknown, no advantake was taken, the contract has been executed, and the parties cannot be put in *statu quo,* it will not be set aside."

In Berrins *v.* McKenzie, 23 Iowa 333, the court said: "But with respect to executed contracts, the tendency of modern decision is to hold persons of unsound mind liable

in cases where the transaction is, in the ordinary course of business, fair and reasonable, and the mental condition is not known to the other party, and the parties cannot be put in *statu quo*."

In Bank *v.* Moore, 78 Pa. 407, a lunatic was held liable upon a note discounted by him at the bank. Among other things, the court said: "Many insane persons drive as thrifty a bargain as the shrewdest business men without betraying in manner or conversation the faintest trace of natural derangement. It would be an unreasonable and unjust rule that such person should be allowed to obtain the property of innocent parties and retain both the property and its price."

Applying the law thus declared, to the case at bar, the district court committed no error in overruling the demurrer. It appears from the pleadings that the conveyance was executed and delivered before an inquisition and finding of lunacy; that no offer was made to return to the purchaser his money paid for the conveyance to the land; and the answer sets forth good faith on the part of the purchaser; that he paid a fair and reasonable price for the land; that he had no knowledge or information of the lunacy of the ward of the plaintiff; but that there was nothing in her looks or conduct at the time to indicate that she was of unsound mind, or incapable of transacting business; but, on the contrary, that she was apparently in possession of her full mental faculties, and was then, and had been for a long time prior, engaged in the transaction of business for herself. * * *

Judgment affirmed.

Editor's Note.—In most cases by express statutory provision the deeds or other contracts of a person who has been judicially declared insane and placed under guardianship, are absolutely void and not merely voidable. 22 Cyc. 1198.

Editor's Note.—If the inquisition overreaches an anterior period of time during which the person is found to have been insane it raises a presumption of the existence of insanity during that period, which presumption, however, is not conclusive but may be rebutted by evidence of sanity during the period overreached by the finding. 22 Cyc. 1134.

Contractual power of intoxicated persons

WRIGHT *v.* WALLER,
127 Ala. 557 (1900).

Appeal from judgment for defendant.

McCLELLON, C. J.: This is an action by Wright against Waller on a contract in writing signed by the latter to pay rent. Defendant sought to avoid the contract on the ground that he was intoxicated when he signed it. There was evidence tending to show that the defendant was in a state of "complete drunkenness, dethroning reason, when he signed the paper;" and on the other hand, there was evidence tending to show that he was not drunk at the time. There was no evidence that plaintiff had anything to do with bringing about the defendant's intoxicated condition, if he was intoxicated, nor that defendant's mind was impaired by habitual drunkenness, nor that the contract was in itself unconscionable or unfair. On this state of the case the Court, in its general charge, said: "If the defendant was so much under the influence of strong drink, or intoxicating liquor, that his reason was dethroned to an extent that he could not give that attention to the signing of the note that a reasonably prudent man would be able to give, then the note would be void." And at the request of the defendant the Court gave the following charge: "If the jury find from the evidence that the defendant signed the note under such intoxication that he could not give proper attention to it, then the note is not evidence in the case, but void." To these instructions the plaintiff excepted and their soundness *vel non* is the question presented on this appeal. * * *

The following are some of the statements of the governing principle applicable to cases like this found in the authorities: "* * * Intoxication so deep as to take away the agreeing mind, in other words to disqualify the mind to comprehend the subject of the contract and its nature and possible consequences, impair such contract if made while it lasts the same as insanity. But mere drunkenness, or being

a drunkard, or simply being drunk at the time, where the intoxication does not extend to the degree thus stated, will not impair the contract. To have this effect it must render the party *non compos mentis* for the occasion." Bishop on Contracts 980, 981. "The contract of a drunken person is voidable at his option, if it can be shown that at the time of making the contract he was absolutely incapable of understanding what he was doing." Anson on Contracts, 150. * * * "Intoxication to the extent only that the party did not clearly understand" the business in hand "is not enough to render the contract voidable or void." Henry *v.* Riten-our, 31 Ind. 136. "It is also urged that the plaintiff in error is not bound by the transaction because he was drunk at the time he signed the note. We think the evidence shows that he was at the time drunk. But he was manifestly not so drunk but he knew what he was engaged in at the time. He, on the trial, testified to the circumstances attending the transaction. He says he took out the note and threw it down, and told them to take it and that they had better take his clothes. Had he been so drunk as to render the assignment void he could not have known or remembered what he did. To render the transaction voidable he should have been so drunk as to have drowned reason, memory and judgment, and impaired the mental faculties to an extent that would render him *non compos mentis* for the time being." Bates *v.* Voll, 72 Ill. 108.

It is plain that the rule given in charge to the jury by the trial court in this case is a radical departure from the established and true rule obtaining in all such cases. * * * The charge given at the defendant's request should, therefore, have been refused. * * * Many perfectly sane and sober men could not bind themselves by contract at all, if the rule laid down there is a sound one. The law does not gauge contractual competency by the standard of mental capacity possessed by reasonably prudent men. A man is not incapacitated because of intellectual limitation arising from intoxication or what not which prevent him from

giving to a proposed contract all the consideration that a reasonably prudent man would be able to give it. Indeed, that test has no relation to mental capacity.

Reversed and remanded.

CONTRACTS OF CORPORATIONS

SLATER WOOLEN CO. *v.* LAMB,
143 Mass. 420 (1887).

Appeal from judgment for plaintiff.

Action upon contract for goods sold and delivered.

FIELD, J.: If we assume that the truth of the exceptions has been established, we think that they must be overruled. The substance of the defendant's contentions is, that the Slater Woolen Company, having been incorporated "for the purpose of manufacturing fabrics of wool and worsted or of a mixture thereof with other textile materials," could not, by and in the name of persons who were in fact keeping a store as its agents, but whose agency was undisclosed, sell groceries, dry goods, and other similar articles to the defendant, who was not employed by the company, and then maintain an action against him to recover either the price or the value of the goods sold.

If the goods were the property of the plaintiff, and were sold by its agents, the plaintiff can sue as an undisclosed principal.

It was said of Chester Glass Co. *v.* Dewey (16 Mass. 94), in Davis *v.* Old Colony Railroad (131 Mass. 258, 273), that "The leading reason assigned was, 'the legislature did not intend to prohibit the supply of goods to those em-

Editor's Note.—A contract entered into by a person who is so drunk as not to know what he is doing is voidable only and not void and may, therefore, become ratified by him when he becomes sober. Carpenter *v.* Roger, 61 Mich. 384 (1886).

ployed in the manufactory,' in other words, the contract sued on was not *ultra vires*. That reason being decisive of the case, the further suggestion in the opinion, 'Besides, the defendant cannot refuse payment on this ground; but the legislature may enforce the prohibition, by causing the charter to be revoked, when they shall determine that it has been abused,' was, as has been since pointed out, wholly *obiter dictum*." But the weight of authority, we think, supports the last reason given in its application to the facts of the present case. There is a distinction between a corporation making a contract in excess of its powers, and making a contract which it is prohibited by statute from making, or which is against public policy or sound morals; and there is also a distinction between suing for the breach of an executory contract and suing to recover the value of property which has been received and retained by the defendant under a contract executed on the part of the plaintiff.

If it be assumed, in favor of the defendant, that the contracts of sale in the case at bar were *ultra vires* of the corporation, they were not contracts which were prohibited, or contracts which were void as against public policy or good morals; the defect in them is, that the corporation exceeded its powers in making them. The defendant, under these contracts, has received the goods, and retained and used them. Either the corporation must lose the value of its property, or the defendant must pay for it; in such an alternative, courts have held, on one ground or another, that an action can be maintained when the sole defect is a want of authority on the part of the corporation to make the contract. We think that the corporation can maintain an action of contract against the defendant to recover the value of the goods. The defendant is not permitted to set up this want of authority as a defense; and as the form of the transaction was that of contract, such should be the form of the action.

We are not required to determine whether an action can be maintained to recover the price, as distinguished from the value of the goods, as no exception has been taken to the measure of damages.

Exceptions overruled.

CONTRACTS OF MARRIED WOMEN

WELLS *v.* CAYWOOD,

3 Col. 487 (1877).

This was an action of ejectment to determine the title to certain real estate. The question for decision is whether or not a conveyance by a husband to his wife confers a good title upon the wife, and generally concerning the contractual rights of married women.

THATCHER, C. J.: This brings us to the consideration of the question of the relation of husband and wife under the laws of this State, with respect to the independent acquisition, enjoyment, and disposition of property. The general tendency of legislation in this country has been to make husband and wife equal in all respects in the eye of the law, to secure to each, untrammeled by the other, the full and free enjoyment of his or her proprietary rights, and to confer upon each the absolute dominion over the property owned by them respectively. The legislation of our own State upon this subject, although yet somewhat crude and imperfect, has doubtless been animated by a growing sense

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Editor's Note.—A contract ultra vires being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money parted with on faith of the unlawful contract, to be recovered back or compensation to be made for it. Central Transportation Co. *v.* Pullman's Car Co., 139 U. S. 24, 60 (1890).

of the unjustly subordinate position assigned to married women by the common law, whose asperities are gradually softening and yielding to the demands of this enlightened and progressive age. The benignant principles of the civil law are being slowly but surely grafted into our system of jurisprudence. "In the civil law," says Sir William Blackstone (1 Blackstone's Com. (Cooley) 444), "husband and wife are considered as two distinct persons, and may have separate estates, contracts, debts and injuries, and therefore, in our ecclesiastical courts a woman may sue and be sued without her husband."

The courts—which have ever been conservative, and which have always been inclined to check, with an unsparing hand, any attempt at departure from the principles of the body of our law, which were borrowed from England—in the States which were the first to pass enactments for the enlargement of the rights of married women, regarding such enactments, as a violent innovation upon the common law, construed them in a spirit so narrow and illiberal as to almost entirely defeat the intention of the law-makers; but generally with a promptness that left little room for doubt, a succeeding legislature would reassert, in a more unequivocal form, the same principles which the courts had before almost expounded out of existence. To understand the marked changes which our own legislation has wrought in this respect, it is necessary that we should consider some of the disabling incidents and burdens attendant upon coverture at common law. At common law the husband and wife are one person, and as to every contract there must be two parties, it followed that they could enter into no contract with each other. "The very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection and cover she performs everything." "Upon the principle of an union of person in husband and wife depend almost all the legal

rights, duties and disabilities that either of them acquire by marriage." 1 Cooley's Blackstone 442.

All the personal estate, as money, goods, cattle, household furniture, etc., that were the property and in possession of the wife at the time of the marriage, are actually vested in the husband, so that of these he might make any disposition in his lifetime, without her consent, or might by will devise them, and they would, without any such disposition, go to the executors or administrators of the husband and not to the wife, though she survive him. Debts due to the wife are so far vested in the husband that he may, by suit, reduce them to possession. 2 Bacon's Abridgment 21. The rents and profits of her land during coverture belong to the husband.

The law wrested from the wife both her personal estate and the profits of her realty, however much it might be against her will, and made them liable for his debts.

An improvident husband had it in his power to impoverish the wife by dissipating her personal estate, and the profits of her realty over which she, under the law, by reason of the coverture, had no control.

The wife in Colorado is the wife under our statutes, and not the wife at common law, and by our statutes must her rights be determined, the common law affecting her rights, as we shall presently see, having been swept away.

By our laws it was declared that the property, real and personal, which any woman may own at the time of her marriage, and the rents, issues, profits and proceeds thereof, and any real, personal or mixed property that shall come to her by descent, devise or bequest, or be the gift of any person except her husband, shall remain her sole and separate property notwithstanding her marriage, and not be subject to the disposal of her husband or liable for his debts. R. S. 1868, p. 454.

The legislature, however, being reluctant to allow a married woman the absolute dominion over her own real property, further provided that she could only convey her

estate in lands by uniting with her husband in any conveyance thereof, and acknowledging the same separate and apart from her husband. R. S. 1868, p. 111, Sec. 17.

It was not to be expected that our laws would long be permitted to remain in this anomalous and incongruous condition, declaring in one section that the wife's real property should remain her separate estate, not subject to disposal by her husband, and in another that she could not convey it without the consent of her husband, which is necessarily implied by his uniting in a deed with her.

By "an act concerning married women," approved February 12, 1874, it is provided in Section 1, that any woman, while married, may bargain, sell and convey real and personal property, and enter into any contract in reference to the same, as if she were sole. Section 2 provides that she may sue and be sued, in all matters, the same as if she were sole. Section 3 provides that she may contract debts in her own name, and upon her own credit, and may execute promissory notes, bonds and bills of exchange, and other instruments in writing, and *may enter into any contract* the same as if she were sole. Section 4 repeals Section 17 of Chapter 17 of the Revised Statutes, which required the husband to unite with the wife in conveying her separate estate. This is, essentially, an enabling statute, and as such must be liberally construed to effectuate the purpose of its enactment. It confers, in terms, enlarged rights and powers upon married women. In contemplation of this statute, whatever may be the actual fact, *a feme covert* is no longer *sub potestate viri* in respect to the acquisition, enjoyment and disposition of real and personal property. This statute asserts her individuality and emancipates her, in the respects within its purview, from the condition of thraldom in which she was placed by the common law. The legal, theoretical unity of husband and wife is severed so far as is necessary to carry out the declared will of the law-making power. With her own property she, as any other individual who is *sui juris,* can do what she will, without reference to any

restraints or disabilities of coverture. Whatever incidents, privileges and profits attach to the dominion of property, when exercised by others, attach to it in her hands. Before this statute her right to convey was not untrammeled, but now it is absolute without any qualification or limitation as to who shall be the grantee. Husband and wife are made strangers to each other's estates. There are no words in the act that prohibit her from making a conveyance directly to her husband, and it is not within the province of the court to supply them. * * *

The removal in respect to the wife, of a disability that is mutual and springing from the same source removes it also as to the husband. The reason, which is the spirit and soul of the law, cannot apply to the husband as it no longer applies to the wife. If she may convey to the husband, the husband may convey to the wife. Allen *v.* Hooper, 50 Me. 371; Stone *v.* Gazzam, 46 Ala. 269; Burdeno *v.* Ampeise, 14 Mich. 91; Patten *v.* Patten, 75 Ill. 443.

Editor's Note.—The law concerning the contractual powers of married women differs considerably in the different states. The statutes of the particular state should be studied.

Chapter IV

REALITY OF CONSENT

MISTAKE

Mutual mistake as to subject matter

ABRAM RUPLEY ET AL. *v.* JOHN F. DAGGETT, 74 Ill. 351 (1874).

Appeal from judgment for plaintiff.

This was an action of replevin, brought by John F. Daggett against Abram Rupley and Jacob Rupley, to recover a mare which the defendants claimed they had bought of the plaintiff.

It appears that at the first conversation about the sale of the mare, Rupley asked the plaintiff his price, the plaintiff swearing that he replied $165, while the defendant testified that he said $65, and that he did not understand him to say $165. In the second conversation Rupley says he told Daggett, that if the mare was what he represented her to be, they would give $65, and Daggett said he would take him down next morning to see her. Daggett denied this, and says that Rupley said to him, "Did I understand you sixty-five?" Daggett states that he supposed Rupley referred to the fraction of the $100, and meant sixty-five as coupled with the price named at the previous interview. He answered, "Yes, sixty-five." Both parties, from this, supposed the price was fixed. Rupley supposing it was $65, and Daggett supposing it was $165, and the only thing remaining to be done, as each thought, was for Rupley to see the mare and decide whether she suited him. The next day Rupley came, saw the mare and took her home with him. The plaintiff recovered in the court below, and the defendants appealed.

SCOTT, J., delivered the opinion of the Court.

It is very clear, from the evidence in this case, there was no sale of the property understandingly made. Appellee supposed he was selling for $165, and it may be appellant was equally honest in the belief that he was buying at the price of $65. There is, however, some evidence tending to show that appellant, Rupley, did not act with entire good faith. He was told, before he removed the mare from appellee's farm, there must be some mistake as to the price he was to pay for her. There is no dispute this information was given him. He insisted, however, the price was $65, and expressed his belief he would keep her if there was a mistake. On his way home with the mare in his possession he met appellant, but never intimated to him he had been told there might be a misunderstanding as to the price he was to pay for her. This he ought to have done, so that if there had been a misunderstanding between them it could be corrected at once. If the price was to be $165, he had never agreed to pay that sum, and was under no sort of obligation to keep the property at that price. It was his privilege to return it. On the contrary, appellee had never agreed to sell for $65, and could not be compelled to part with his property for a less sum than he chose to ask. It is according to natural justice, where there is a mutual mistake in regard to the price of an article of property, there is no sale, and neither party is bound. There has been no meeting of the minds of the contracting parties, and hence there can be no sale. This principle is so elementary it needs no citation of authorities in its support. Any other rule would work injustice and might compel a person to part with his property without his consent, or to take and pay for property at a price he had never contracted to pay.

No material error appearing in the record, the judgment must be affirmed.

Judgment affirmed.

Mutual mistake—Reformation of deed

EZELL *v.* PEYTON ET AL., APPELLANTS,

134 Mo. 484 (1896).

Appeal from judgment for plaintiff.

BURGESS, J.: This is a suit in equity to reform two deeds, one dated October 16, 1889, and executed by E. N. Peyton and wife to John L. Harrison and John Hamilton; the other dated November 27, 1889, executed by said Harrison and Hamilton and their wives to plaintiff, both deeds conveying lot 3 and the west half of lot 2 in block 29, in Freeman, Cass County, Missouri. * * *

Hamilton testified, that during his negotiations for the property he and Peyton were on the west fence, and he said to Peyton, "Ed, I want to know how much land there is here, how much is it?" and Peyton said, "There is a lot and a half of a lot"; and Peyton further said, "It is all inside of this fence, inclosed in this fence; what you see in here embraces that"; and, Hamilton testified, "I took it for granted that that fence was around a lot and a half of ground." * * *

It does not appear that Peyton knew where the lines between the lots were, but that he sold to Hamilton and Harrison all the land inclosed by the fence, and that they so bought not only seems clear from the evidence of Hamilton, but is shown by all the evidence in the case. And it makes no difference so far as their rights, and plaintiff who claims under them, are concerned, that the deeds do not embrace the land actually sold.

Hamilton and Harrison did not buy the land as described in the deed to them, but bought the land that was inclosed by the fence which they and Peyton understood to be correctly described by the deed from himself and wife to them, when it was not. It was a mutual mistake between the parties to the deed from Peyton to Harrison and Hamilton in that the land in question is not a part of lot 3 and the west half of lot 2, and the same mistake entered into

the sale of the lot by Harrison and Hamilton to plaintiff. The grantees in both deeds had the right to rely upon the statements and representations of their respective grantors, with respect of the boundaries of the land purchased by them. Even though the deed or deeds to Peyton for the land may have been on record, they furnished no information as to the exact location of its boundaries, and the purchasers were not in fault in relying upon his statements and representations with respect thereto, they having no reason to believe the same to be untrue.

In Butler *v.* Barnes, 60 Conn. 170, it was held that a mutual mistake of grantor and grantee in supposing land staked and pointed out to the grantee by the grantor belonged to the latter, while in fact it included a strip belonging to an adjoining owner, whose land was made a boundary by a description of the premises in the deed, entitled the grantee to have the deed reformed.

In the case in hand the land was inclosed by a fence and presents a much stronger case for equitable relief than that case did.

It is immaterial whether the error in the description of the land actually pointed out and sold was the result of intentional or unintentional misstatement on the part of Peyton, as equity will afford relief as well in the one case as in the other. Smith *v.* Jordan, 13 Minn. 270; Botsford *v.* McLean, 45 Barb. 478.

Our conclusion is that the evidence clearly shows that there was a mutual mistake between Peyton and Harrison and Hamilton in that the description of the land as contained in the deed by him to them does not embrace all the land pointed out, and represented by him as being inclosed by the fence, and part of lot 3 and the west half of lot 2, and that the same mutual mistake existed in the sale and deed from Harrison and Hamilton to plaintiff, and that he is entitled to the relief sought. The judgment is affirmed.

Mistake of one party as to identity of other party

SAMUEL A. STODDARD AND ANOTHER *v.* JOSEPH HAM,

129 Mass. 383 (1880).

Appeal from judgment for plaintiffs.

Tort for the conversion of a quantity of bricks. Answer, a general denial. Trial in the Superior Court, without a jury before Pitman, J., who reported the case for the determination of this court upon the following facts found by him.

The plaintiffs were manufacturers of and dealers in bricks, at Bangor, Me. The bricks in question were there purchased of the plaintiffs by Charles E. Leonard, who did a commission business in that city, but sometimes bought on his own account. The plaintiffs supposed they were selling these bricks to the defendant through Leonard as his agent; and they were sold on the credit of the defendant solely and would not have been sold on the personal credit of Leonard; but Leonard was not the agent of the defendant in this purchase, and had no authority to bind him. Leonard was not guilty of any false representations as to agency; and it was a case of error and mistake on the part of the plaintiffs as to the principal with whom they were dealing.

The bricks were bought upon short credit and were immediately sold by Leonard to the defendant, at a fixed price delivered in Boston, and were, in fact, bought with a view to such sale. The bricks remained in the plaintiffs' yard and possession until after the sale by Leonard to the defendant, and were afterwards delivered by the plaintiffs at a wharf in Bangor, as directed by Leonard, and by him shipped to the defendant, Leonard taking the bills of lading in his own name. Leonard sold other bricks to the defendant, at or about the same time, and drew drafts against the aggregate cargoes, which were accepted and paid by the defendant, who also paid the freight on account of Leonard.

From the proceeds, certain payments were made by Leonard to the plaintiffs, who supposed that they were made on the defendant's account, and they were credited to the latter. After the bricks were all delivered, Leonard failed in business, and no other payments were made. Leonard was largely indebted to the defendant, and he offset the claim of Leonard for the balance due him on the bricks by this antecedent indebtedness. After Leonard stopped payment, the plaintiffs made due demand on the defendant for the bricks, contending that they had never parted with the property in them, if the defendant repudiated the agency of Leonard; and offered to repay the defendant for all advances and expenses incurred by him; but the defendant refused to deliver them, and claimed to hold by purchase from Leonard. At the time of the demand, the defendant had on hand some of the bricks which came from the plaintiffs' yard; the others had been sold and delivered by the defendant as they arrived.

Upon these facts, the judge ruled, as matter of law, that the plaintiffs could not recover; and ordered judgment for the defendant. If the ruling was right, judgment was to be entered for the defendant; otherwise, the case to stand for a new trial.

COLT, J.: This case was tried without a jury, and there is no reason to doubt that, upon the facts found by the judge, it was correctly ruled that the plaintiffs could not recover in tort for the conversion of the property in dispute.

It is not enough to give the plaintiffs a right to recover, that they supposed they were selling bricks to the defendant, through Leonard, his agent, and that they would not have sold them to Leonard on his sole credit. The judge found that they were in fact sold to Leonard. There was no fraud, no false representation of agency, or pretense on the part of Leonard that he was buying for any one else. He was a commission merchant, who was in the habit of purchasing goods on his own account, and who honestly bought the bricks for himself and sold them to the defendant

as his own. It was not a case of mistaken identity. The plaintiffs knew that they were dealing with Leonard; they did not mistake him for the defendant; nothing was said as to any other party to the sale. The conclusion is unavoidable that the contract was with him. The difficulty is that the plaintiffs, if they had any other intention, neglected then to disclose it. It was a mistake on one side, of which the other had no knowledge or suspicion, and which consisted solely in the unauthorized assumption that Leonard was acting as agent for a third person, and not for himself.

It is elementary in the law governing contracts of sale and all other contracts, that the agreement is to be ascertained exclusively from the conduct of the parties and the language used when it is made, as applied to the subject matter and to known usages. The assent must be mutual, and the union of minds is ascertained by some medium of communication. A proposal is made by one party and is acceded to by the other in some kind of language mutually intelligible, and this is mutual assent. Met. Con. 14. A party cannot escape the natural and reasonable interpretation which must be put on what he says and does, by showing that his words were used and his acts done with a different and undisclosed intention. Foster *v.* Ropes, 111 Mass. 10, 16. It is not the secret purpose, but the expressed intention, which must govern, in the absence of fraud and mutual mistake. A party is estopped to deny that the intention communicated to the other side was not his real intention. To hold otherwise would be to put it in the power of the vendor in every case to defeat the title of the vendee and of those holding under him, by proving that he intended to sell to another person, and so there was no mutual assent to the contract.

In Boston Ice Co. *v.* Potter, 123 Mass. 28, cited by the plaintiffs, there was no privity of contract established between the plaintiff and the defendant. There was no evidence afforded in the conduct and dealings of the parties, that the defendant assented to any contract whatever with

the plaintiff. A stranger attempted to perform the contract of another party with the defendant.

In Hardman *v.* Booth, 1 H. & C. 803, there was abundant evidence that the contract was with another party, to whom the goods were sent, and not with the person who obtained possession of them and sold them to the defendant. In Mitchell *v.* Lapage, Holt N. P. 253, the goods were expressly bought of a firm, which, without the knowledge of the broker, had been dissolved by the witdhrawal of two of its members.

We are referred to no case which supports the claim here made by the plaintiffs.

Judgment for the defendant.

Mistake of one party as to terms of written contract

SILAS R. HILL, RESPONDENT, *v.* THE SYRACUSE, BINGHAMTON AND NEW YORK R. R. CO.

73 N. Y. 351 (1878).

Appeal from judgment for plaintiff.

This action was brought to recover damages for the alleged non-performance of a contract, entered into by defendant as a common carrier. The plaintiff delivered a quantity of wool at defendant's depot at Whitney's Point, to be carried to New York City. Plaintiff gave evidence tending to show that before the delivery of the wool he made a parol agreement with the person in charge of defendant's depot that the wool should be shipped by defendant within two weeks, and that upon the faith of such agreement the delivery was made. This evidence was objected to upon the ground that the agreement between the parties was in writing, and that oral evidence, changing or modifying the same, was incompetent. The objection was overruled and defendant's counsel duly excepted. It ap-

Editor's Note.—A mistake of one party unknown to the other is not generally a ground for avoiding a contract. An important exception exists where one party is under a mistake as to the substance of the contract and the other party knows it. In such cases the contract is void. If, however, the mistake of the one party is only in opinion as to the value or quality of the subject matter, or as to his expectations or motives, the knowledge of the other is immaterial. Thus a seller of property need not disclose matters affecting its value, nor a buyer, matters within his knowledge enhancing its value. 9 Cyc. 394 et seq.

peared that afterwards, and on the same day, as plaintiff was about to start for his home, he received from defendant's agent, at the depot, receipts or bills of lading for the wool, but examined them no further than to see that the weights were correct, and then put them in his pocket, and did not notice the conditions therein until next day. By such conditions the defendant was exempted from liability arising from any delay. The wool was not shipped until nearly two months after. In the meantime, the value of the wool in market had fallen off nearly 30 cents per pound.

CHURCH, C. J.: The decision of this court in the recent case of Ins. Co. *v.* R. R. Co. (72 N. Y. 90) is decisive in this case that the receipt of bill of lading delivered to the plaintiff is to be regarded as a contract between the parties, instead of the parol agreement alleged to have been made previously, but on the same day, between the plaintiff and the person in charge representing the agent. The decision in Boswick *v.* R. R. (45 N. Y. 712) was not intended to impair the general and well-settled rule that when goods are delivered to a carrier for transportation, and a bill of lading or receipt is delivered to the shipper, he is chargeable with notice of its contents and is bound by its terms, and that prior parol negotiations cannot be resorted to to vary them. In that case the property had been shipped by the carrier before the bill of lading was delivered, and was beyond the reach or control of the shipper. This court held that the carrier having shipped the property after the parol contract and before delivery of the bill of lading, was bound by the parol contract, and could not afterwards change it without the express consent of the shipper; but to apply the rule in a case like this would destroy the protection which the delivery and acceptanee of a bill of lading affords. The delivery of the property and bill of lading are generally regarded as simultaneous acts, although the delivery of the property necessarily precedes the making and delivery of the receipt or bill of lading, and in most cases some parol negotiations precede the delivery of the property.

In this case the receipt was made immediately after the receipt of the property, and delivered very soon after, the intervening time being while the plaintiff was getting his team preparatory to starting home. By accepting the contract without objection the other party had a right to assume that he assented to its terms, and the fact of not reading it cannot be interposed to prevent the legal effects of the transaction. It appears that in this case the plaintiff did, in fact, read the paper on the next day, and knew and understood its contents. If he was not satisfied with its terms, he had then abundant opportunity to reclaim his property or insist upon a modification of its provisions, but he did neither. If he relied upon the statement of the agent, that the property would be shipped within two weeks, it must have been upon faith in the opinion of the agent, and not as a binding contract with the company, as the bill of lading expressly notified him that station agents had no authority to vary or change the terms of a contract as expressed in the paper delivered. Although the receipt or bill of lading must be taken as the contract between the parties, there is nothing in its terms which will protect the company from liability if the delay and consequent loss was occasioned by its negligence, or that of its servants or agents. The record presents the case in a peculiar aspect. The complaint is on the parol contract to ship the property within two weeks. The trial judge charged that the parol contract was binding and obligatory instead of the bill of lading, but charged also that unless the delay was produced by the negligence of the defendant or its agents the plaintiff could not recover. The general term held that the evidence not being sufficient to establish *gross* negligence, the plaintiff could not recover on that ground, but also held that the parol contract was binding, and as the property was not shipped within the two weeks specified, the plaintiff was entitled to recover.

Another embarrassment is that the refusal to the several requests to charge which were intended to present the

point as to the binding force of the two contracts was excepted to in such a general form that it is doubtful whether in strictness it is available in this court. If the trial judge had ignored the parol agreement, the verdict could not be disturbed unless the case is destitute of any evidence to sustain the finding of negligence, because the defendant is liable if the injury was produced by its negligence. Nor is it necessary to establish gross negligence as the general term seems to have supposed. A want of ordinary care by a carrier, if it causes injury, is sufficient.

We think that there must be a new trial. The charge of the judge that the parol contract was a contract between the parties may have had a material influence upon the jury upon the question of negligence, and although the exception to the request is not sufficiently specific, the same question was presented during the trial and an exception properly taken. If an amendment of the complaint is necessary, it can be obtained as a matter of course. Allegations of negligence would not substantially change the cause of action. The failure to perform either contract through negligence would be a breach of duty.

Judgment reversed and new trial ordered.

Editor's Note.—"In this State, I take it, the principle that parol evidence, which goes to destroy, contradict, extend or alter a deed is inadmissible, has been recognized with some salutary exceptions and modifications; for instance, where fraud or surprise in obtaining the deed, mistake of the scrivener, in departing from his instructions, or any other clear matter of mistake are made to appear and present themselves to the court, parol evidence has been held to be admissible in this State." Smith, J., in Collan *v.* Hocker, 1 Rawle (Pa.) 107, 111.

MISREPRESENTATION

What constitutes misrepresentation

NORMAN SPURR *v.* CALEB BENEDICT,

99 Mass. 463.

Bill in equity for an injunction on the defendant against prosecuting an action at law on a promissory note of the plaintiff, and for general relief in the matter of a purchase of land by the plaintiff of the defendant. The case was referred to a master, who found the facts hereafter stated; and was reserved on his report, by Gray, J., for the determination of the full court.

In the autumn of 1864 the defendant entered into a negotiation to buy from Sarah Wheelock a lot of forty-five acres of woodland, situated near the boundary line between Sheffield and Great Barrington; employed Lyman M. Merryfield, who owned the land adjoining, to point out the lot to him, and took a deed from Wheelock, dated October 17, 1864, supposing that it covered all the land pointed out by Merryfield, when, in fact, Merryfield was mistaken as to the boundaries of Wheelock's lot, and had pointed out to the defendant as part of it some land adjoining a cleared field and an old public road, which did not belong to Wheelock and was not covered by her deed.

Later in the autumn the defendant offered to sell the lot to the plaintiff, to whom he represented that it was situated in Sheffield, adjoined a cleared field and a good wagon road, "was all of it dry land, and very comfortable land to get timber off of," "would cut from fifteen to eighteen cords per acre," and that one "could go with a team on almost any part of it." And soon afterwards Henry Snyder, the plaintiff's agent, met the defendant, by agreement, for an examination of the land; and the defendant pointed out to him, as belonging to it, the land adjoining the cleared field and the road, "and one boundary, at least (a large rock), which was at some distance from his land." "As the

result of this examination it was agreed, between Snyder and the defendant, that the defendant should convey the land to the plaintiff, who should give his note to the defendant in the sum of $600." "Snyder wanted a warranty deed, which the defendant refused to give, but executed a quit-claim deed" without any covenant of title or warranty, "and left it with one Bradford, to be delivered to the plaintiff when he should give his note for the $600; and the plaintiff afterwards called and took his deed and left the note," which was made payable on demand. "Snyder's first offer to the defendant was, 'I will give you $600 if you will survey the land out for me,' and the defendant replied, 'No, I will not do that,' and, either in this connection or while they were upon the land, said, 'There are the minutes; you can survey it as well as I can.' "

The deed described the premises conveyed as a parcel of land in Sheffield, "being the same tract of land I purchased of Sarah Wheelock by her deed dated October 17, 1864," and referred to the Wheelock deed, or the record thereof, for a more particular description. The land which it covered was not situated in Sheffield, but in Great Barrington, a hundred and thirty rods north of the boundary line between the two towns; would not cut from fifteen to eighteen cords of wood per acre, but would cut in part five or six cords, in part eight or ten and in part twelve or fifteen cords; included some ledges of rock not accessible by teams, and also a swamp more than an acre in area; and did not adjoin any public road, but did adjoin a "wood road" along its southern boundary.

The land erroneously shown to Snyder as belonging to the lot included at least six or eight acres, would cut from twelve to fifteen cords of wood per acre, and, as above stated, adjoined an old public road (which, however, was but little used) and a cleared field.

During the ensuing winter Snyder went upon the conveyed premises with a surveyor to identify their boundaries, but was unsuccessful in the effort; and by the direc-

tion of the plaintiff (who had never occupied or used the land) he proposed to the defendant to return the deed and take back the note; but the defendant refused the proposal, and afterwards sued the note against the plaintiff; whereupon the plaintiff, who had fully discovered the mistake about the land, made tender to him of a reconveyance of the land and of indemnity against all expenses incurred by him in the suit on the note, and demanded of him a surrender of the note, on the ground of mistake in the contract; and upon his refusal filed this bill.

The plaintiff and Snyder were permitted to testify before the master, against the defendant's objection, that if they had known the facts about the land, as afterward ascertained, they would not have concluded the purchase; and the plaintiff further to testify that the fact alone that the land was situated in Great Barrington instead of Sheffield would have made a difference with him.

FOSTER, J.: There can be no doubt of the full equity jurisdiction of this court to set aside a conveyance of land, on the ground of mistake, where the vendor has undertaken to sell something which he did not own, and the estate embraced in the deed, although owned by him, is not that which the vendee intended to buy and supposed that he was obtaining by the conveyance. In such a case the equity for a recission of the transaction does not depend upon any intentional fraud on the part of the grantor, and it is by no means limited to cases in which an action for deceit would lie at common law. Mistake is a head of equity jurisdiction distinct from fraud. Relief is granted on the ground that it would be unconscientious to oblige a man, who has not been himself negligent or in fault, to adhere to his bargain, and to retain property which he was induced to purchase by a misapprehension as to a material and essential circumstance, which he was led into by the conduct of the other party.

In the present instance the defendant not only made exaggerated statements as to the value and quality of the

land he proposed to sell, but he pointed out to the plaintiff's agent some land which he did not own, as embraced in the bargain, and one boundary which was at a considerable distance from the premises which he actually owned and conveyed by his deed. The land pointed out to the plaintiff's agent was of a better quality than that conveyed, would cut more wood and corresponded with the description which the defendant had given to the plaintiff himself. All this appears to have been done innocently. Neither the purchaser nor his agent seems to have been negligent. They naturally relied on the vendor to point out the boundaries of his estate, and there was nothing in the deed to indicate that the land shown and conveyed was not the same. The defendant was himself mistaken as to what he owned, and consequently misled the plaintiff; and under the influence of this mutual error the transaction was consummated. But the prejudicial consequences to the purchaser are the same as if the conduct of the vendor had been designedly fraudulent. He has obtained, not what he expected to have, but something else which he did not intend to buy and would not have bought if he had known the truth. Of this we are satisfied, upon the report of the master; and it amounts to a case for equitable relief.

Nor is the fact that only a quit-claim deed was given any bar to the plaintiff's equity; because the mistake does not relate to the title obtained, but to the very subject matter of the contract. One parcel was bargained for and supposed by both parties to be embraced in the deed; another and different one was actually conveyed. The absence of covenants of title and warranty can make no difference, as their insertion would have afforded no protection against a mistake of this description. For a citation of the authorities and discussion of this question, see Earle *v.* De Witt, 6 Allen 520. The plaintiff has already executed and tendered a reconveyance of the estate, and is entitled to a

Decree perpetually enjoining the defendant against prosecuting the action at law pending upon the note given for the purchase money.

Misrepresentation—Warranties

WOLCOTT, JOHNSON & CO. *v.* LEWIS D. MOUNT, 38 N. J. L. 496 (1875).

Appeal from judgment for plaintiff.

BEASLEY, C. J.: The defendant (Wolcott, Johnson & Co.) sold to the plaintiff (Mount) certain seed as and for "early strap-leaf red-top turnip seed." The seed, being planted, turned out to be a different kind, so that the plaintiff lost his crop. It was shown in the case that the defendant believed, at the time of the sale, that the seed was of the kind which the plaintiff sought to purchase. The plaintiff brought his suit before a justice, on the ground that the sale to him, under these conditions, comprised a warranty. The decision was in his favor, and such judgment was affirmed in the Common Pleas, and, on certiorari, in the Supreme Court.

Therefore, the point before this court now is whether, on the facts stated, the Court of Common Pleas could lawfully infer that the defendant warranted the article sold to be of the particular kind for which it was purchased.

The subject of warranty, in its application to the class of cases in which the present one is comprehended, has been involved in much confusion. The authorities are not consistent, and they are very numerous. It has always seemed to me that a considerable part of this contrariety has arisen from a misapprehension with respect to what was decided in the famous case of Chandelor *v.* Lopus, Cro. Jac. 4. The only question in that case, as I understand it, was as to the sufficiency of the averments in the declaration. The plaintiff's case appearing upon the record is stated in the report in these words, viz.: "Whereas, the defendant being a goldsmith, and having skill in jewels and precious stones, had a stone which he affirmed to Lopus to be a bezoar stone, and sold it to him for a hundred pounds; *ubi revera,* it was not a bezoar stone." The contention in the court of error, upon this record, was that

enough did not here appear to charge the defendant, because it was shown neither that he warranted it to be a bezoar stone nor knew it to be such. Instead of a warranty being expressly laid in the declaration, a mere affirmation as to the kind of article sold was laid, and it was this form of pleading which was adjudged to be bad. Now, an affirmation of this kind may or may not be a warranty, according to circumstances, and the fault of the pleading, therefore, was that, instead of a warranty, it set forth inconclusive evidence of a warranty. The pleader was bound to state the transaction according to its legal effect, and this was all that was decided. And such a form of statement at the present day would, I think, be deemed ill. * * *

The tendency of recent adjudications has been, I think, to put this subject on a reasonable footing. Starting from the admission that, in the absence of fraud and of a warranty, the rule of caveat emptor applies, the effort is not to elevate particular expressions contained in a given contract into a general rule of law, but to regard each case in the light of its own circumstances, and with respect solely to the understanding of the parties. Whether the representation or affirmation accompanying a sale shall be regarded as a warranty or as *simplex commendatio,* is a question to be solved by a search for the intention of the contracting parties. The two cases of Jendwine *v.* Slade, 2 Espinasse 572, and Power *v.* Barham, 4 A. and E. 473, are conspicuous examples of this rule. In the former there was a sale shown of two pictures, the catalogue of the auction describing one as a sea piece, by Claude Lorraine, and the other, a fair, by Teniers. This description was held by Lord Kenyon to be no warranty that the pictures were the genuine works of the artists referred to, but merely an expression of the opinion of the vendor to that effect. In the other case it appeared that, at a sale of four pictures, they were described as "four pictures, views in Venice—Carnaletti," and it was left to the jury to decide whether the intention was to warrant the pictures as au-

thentic, the court distinguishing this case from the former one by the circumstance that Carnaletti was comparatively a modern painter, the authenticity of whose works was capable of being known as a fact, while, with respect to the productions of very old painters, an assertion as to their genuineness was necessarily a matter of opinion. In these instances the respective affirmations of the vendor were of equivalent import, intrinsically considered; but it was left open, as a matter of inference, whether they were to have the same signification when used under variant circumstances. The question consequently is, in every case of this kind, whether the conditions were such that the vendee had the right to understand, and did so understand, that an affirmation or representation made by the vendor was meant as a warranty.

And for the determination of this question, Mr. Benjamin, in his admirable Treatise on Sales, page 499, says: "A decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment. In the former case there is a warranty; in the latter, not." * * *

Resorting, then, to the principle and test just propounded, it is manifest that the judgment of the Supreme Court cannot be disturbed. The Court of Common Pleas, in weighing the evidence, had a right to infer that a warranty of the character of the article sold was within the understanding of the contracting parties. The seller in this case asserted, at the time of the sale, that the seed was of the species which the vendee was in search of. When he made this express assertion, he was aware that the vendee could have no opinion for himself on the subject, for the case states that the seed could not be distinguished by sight or touch. The vendee also knew that the vendor could not be stating the result of his own ob-

servation. The facts do not admit of the imperative inference that the assertion of the vendor was mere commendation of his goods, or even that it was the utterance of his view as an expert. If the seller had stated the exact truth, he would have said that he had bought the seed as seed of the specified kind, but that he did not know whether it was so or not. Instead of doing this, he made the positive assertion in question. From such an assertion, under the circumstances in evidence, I think the court, although it was not bound so to do, had the right to infer that there was a warranty.

Judgment affirmed.

FRAUD

Statements not amounting to fraud

DEMING *v.* DARLING,
148 Mass. 504 (1889).

HOLMES, J.: This is an action for fraudulent representation alleged to have been made to one Dr. Jordan, the plaintiff's agent, for the purpose of inducing the plaintiff to purchase a railroad bond from the defendant.

Among the representations relied on, one was that the railroad mortgaged, which was situated in Ohio, was good security for the bonds; and another was that the bond was of the very best and safest, and was an A No. 1 bond. With regards to these and the like, the defendant asked the Court to instruct the jury "that no representation which the defendant might have made or did make to Dr. Jordan in relation to the value of the bond in question, or of the railroad, its terminals, and other property which were mortgaged to secure it, with other bonds, even though false, were representations upon which Dr. Jordan ought to have relied, and are not sufficient to furnish any grounds for this action";

and also, "that each of the expressions 'and that the same' (meaning said railroad and all the property covered by the mortgage) 'was good security for said bonds,' 'that said bond was of the very best and safest, and was an A No. 1 bond,' are expressions of opinion of value, and even though false, are not such representations as Dr. Jordan had a right to rely upon, and are not enough to furnish any grounds for this action."

The Court declined to give these instructions, and instead instructed the jury that "an expression of opinion, judgment or estimate, or a statement of a promissory nature relating to what would be in the future, so far as they were expressions of opinion, if made in good faith, however strong as expressions of belief, would not support an action of deceit."

It will be seen that the fundamental difference between the instructions given and those asked is that the former require good faith. The language of some cases certainly seems to suggest that bad faith might make a seller liable for what are known as seller's statements, apart from any other conduct by which the buyer is fraudulently induced to forbear inquiries. Pike *v.* Fay, 101 Mass. 134. But this is a mistake. It is settled that the law does not exact good faith from a seller in those vague commendations of his wares which manifestly are open to difference of opinion, which do not imply untrue assertions concerning matters of direct observation (Teague *v.* Irwin, 127 Mass. 217) and as to which it always has been "understood, the world over, that such statements are to be distrusted." Brown *v.* Castles, 11 Cush. 348, 350; Parker *v.* Moulton also shows that the rule is not changed by the mere fact that the property is at a distance, and is not seen by the buyer. Moreover, in this case, market prices at least were easily accessible to the plaintiff.

The defendant was known by the plaintiff's agent to stand in the position of a seller. If he went no further than to say that the bond was an A No. 1 bond, which we

understand to mean simply that it was a first-rate bond, or that the railroad was good security for the bonds, we are constrained to hold that he is not liable under the circumstances of this case, even if he made the statement in bad faith. See, further, Veasey *v.* Doton, 3 Allen 380; Belcher *v.* Costello, 122 Mass. 189. The rule of law is hardly to be regretted, when it is considered how easily and insensibly words of hope or expectation are converted by an interested memory into statements of quality and value when the expectations have been disappointed.

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Exceptions sustained.

What constitutes fraud

CABOT *v.* CHRISTIE,

42 Vt. 121 (1869).

Appeal from judgment for defendant.

Case for false warranty in the sale of a farm.

The plaintiff gave evidence tending to show that he bought the farm at the time and for the price stated in the declaration, and that the defendant made representation in respect to the number of acres, as of his own knowledge, designedly intending to induce the plaintiff to suppose and believe, and thereby the plaintiff was induced to and did suppose and believe, that the farm contained at least one hundred and thirty acres of land, and relying thereupon, the plaintiff made the purchase; that the defendant knew that there was not one hundred and thirty acres, or he didn't know that there was that quantity; that in fact there was only one hundred and seventeen acres and a few rods in the farm; that the plaintiff had no knowledge of the quantity except from the defendant's representation.

The defendant gave evidence tending to show that he supposed there was one hundred and thirty acres and a little

more in the farm, derived from what he had heard said, and from various deeds in his possession of various grantors and of various parcels, but that he did not know, and did not profess or represent to the plaintiff that he knew how many acres there were in fact; that he gave the plaintiff all the information and sources of information he had on the subject, neither making any false representation, nor fraudulent concealment, nor any undertaking as to the number of acres in the farm. There was no evidence or claim that the farm was sold by the acre; but it appeared that it was sold in lump, or as a farm entire.

* * * * * * * * * *

The jury returned a verdict for the defendant. The plaintiff excepted to the charge. * * *

STEELE, J.: 1. The plaintiff cannot recover upon the ground of a parol warranty of the quantity of the land. If the quantity was warranted it should be provable by the deed. It is true that a deed of conveyance need not contain all the stipulations of the parties. For example, the agreements as to consideration and mode of payment need not be embraced in the deed, for the instrument purports to be the deed of but one of the parties. But it does purport to contain the covenants of the grantor with respect to the property conveyed. To add a new covenant by parol proof would be a palpable violation of the familiar rule that written contracts are not to be varied by oral testimony. Such a parol stipulation, it has been held, could not be proved in respect to an ordinary bill of sale of personal property.

Nor is the plaintiff entitled to recover in this action upon the ground of mistake. A mutual and material mistake, by which the purchaser was misled as to the quantity of land, would be a more appropriate ground for relief in a court of chancery than in a court of law.

If, then, the plaintiff was entitled to recover at all in this case, it was by reason of some fraud on the part of the defendant by which the bargain was induced.

The plaintiff complains of the ruling of the County Court upon the subject of fraud. It is conceded that the quantity of land was represented incorrectly. The Court properly told the jury that this, in itself, would not amount to fraud. To entitle the plaintiff to a recovery upon that ground, the defendant must have made some representation upon the subject that he did not believe to be true. The plaintiff claims, and his evidence tended to prove, that the defendant did make such a representation by stating the quantity of land as a matter within his own knowledge, when, in fact, as the defendant concedes, it was a matter upon which he had only a belief. We think it very clear that a party may be guilty of fraud by stating his belief as knowledge. Upon a statement of the defendant's mere belief, judgment, or information, the plaintiff might have regarded it prudent to procure a measurement of the land before completing his purchase. A statement, as of knowledge, if believed, would make a survey or measurement seem unnecessary. A representation of a fact, as of the party's own knowledge, if it prove false, is, unless explained, inferred to be willfully false and made with an intent to deceive, at least in respect to the knowledge which is professed. A sufficient explanation, however, sometimes arises from the nature of the subject itself, or from the situation of the parties, being such that the statement of knowledge could only be understood as an expression of strong belief or opinion. But the quantity of land in a farm is a matter upon which accurate or approximately accurate knowledge is not at all impossible or unusual. If the defendant had only a belief or opinion as to the quantity of land, it was an imposition upon the plaintiff to pass off such belief as knowledge. So, too, if he made an absolute representation as to the quantity, which was understood and intended to be understood as a statement upon knowledge, it is precisely the same as if he had distinctly and in terms professed to have knowledge as to the fact. It is often said that a representation is not fraudulent if the party who makes it

believes it to be true. But a party who is aware that he has only an opinion how a fact is, and represents that opinion as knowledge, does not believe his representation to be true. As is well said in a note to the report of the case of Taylor *v.* Ashton, 11 Mees. & Wels. 418 (Phila. ed.), the belief of a party to be an excuse for a false representation must be "a belief in the representation as made. The *scienter* will, therefore, be sufficiently established by showing that the assertion was made as of the defendant's own knowledge, and not as mere matter of opinion, with regard to facts of which he was aware that he had no such knowledge." The same principle of law has been repeatedly recognized.

In the case before us the plaintiff, under the charge of the Court, was denied the benefit of this rule of law, although there was evidence tending to show every necessary element of a fraud of the nature we have been considering. The plaintiff's request was refused, and the jury was instructed that the plaintiff could only recover in case they found "that the defendant represented the quantity of land different from what he knew or believed to be true." Under these instructions it would be immaterial whether he made the representation as a matter of knowledge or as a matter of opinion so long as he kept within his belief as to the quantity of land. In this we think there was error. The Court properly instructed the jury that the representation, to warrant a recovery, must have been relied on and have been an inducement to the purchase. The subsequent remark that the jury, to hold the defendant, must find that the plaintiff would not have made the purchase but for the representation, we regard as probably inadvertent.

What the plaintiff would have done but for the false representation is often a mere speculative inquiry, and is not the test of the plaintiff's right. If the false representations were material and relied upon, and were intended to operate and did operate as one of the inducements to

the trade, it is not necessary to inquiry whether the plaintiff would or would not have made the purchase without this inducement.

The judgment of the County Court is reversed and the cause is remanded.

What constitutes fraud

ROBERTS *v.* FRENCH,

153 Mass. 60 (1891).

Contract for money had and received by the defendant to the plaintiff's use. Trial in the Superior Court, before Thompson, J., who ruled that the plaintiff was not entitled to recover, and after a verdict for the defendant, reported the case for the determination of this Court. The facts appear in the opinion.

HOLMES, J.: This is an action to recover two hundred dollars paid by the plaintiff as part payment of the price of a lot of land for which he made the highest bid at a sale by auction. The advertisements described the lot as containing about eleven thousand square feet, and as extending one hundred and thirty feet on the east. The plaintiff's evidence tended to show that at the sale one of the firm of auctioneers read the advertisement and said that the defendant's husband and himself had measured the land (as they had done), and that its dimensions were as stated in the posted bill, except as to the easterly line, which was only one hundred and seven feet long. The other auctioneer then proceeded to sell the property, and said that the easterly line was one hundred and seven feet long; that the lot contained about eleven thousand square feet, and that a warranty deed would be given. The sale took place on the premises; the plaintiff was familiar with them, and he understood that he was buying only the land

enclosed by the fences. But, according to his evidence, he believed the statements of the auctioneers as to the length of the lines and the area, and made his bid relying upon them, and we may fairly say by inference, being more or less induced by them to purchase. The easterly line, in fact, was only ninety-five and a half feet long; the other lines varied somewhat from the lengths given at the sale, and the contents were seven thousand seven hundred and sixty feet, being five hundred and sixty-five feet less than what they would have been if the length of the lines stated at the sale had been correct. The defendant has not offered a deed describing the premises as they were described by the auctioneer, but only a deed describing them correctly. The Court below ruled that the action could not be maintained, and the plaintiff excepted.

On the foregoing evidence plainly the jury might have found that the auctioneer made a misstatement of fact as to the length of the easterly line, and also represented that he made the statement on the faith of his own senses, because, as he said, he and the defendant's husband (who, by the way, was also her agent, and was present and assenting to what the auctioneer said) had measured the line. In other words, the statement of the length was a statement, as of the party's own knowledge, of the kind which our decisions pronounce fraudulent. Chatham Furnace Co. *v.* Moffatt, 147 Mass. 403. Notwithstanding the plaintiff's knowledge of how the land looked, the jury also might have found that the statement in fact deceived him, and induced him to buy, and that it materially varied from the truth. It is true that the agreement was to buy a lot with known boundaries, and very likely in absence of fraud, the rule would apply that monuments govern distances in such agreements and in deeds with warranty. But that is only a rule of construction; it does not mean that measurements are not material, or that a man who knows the monuments cannot be deceived about them. Of course, it was not necessary that the plaintiff's belief as to the

length should have furnished his only motive for buying, if it furnished one motive, Safford *v.* Grout, 120 Mass. 20, 25; and if the defendant's agents knew that the representation would affect action on the part of the bidders, or if under the known circumstances it manifestly was likely to do so.

The rulings of the Court below probably assumed all that we have said, but was based on the cases which hold fraudulent representations as to the contents of a piece of land, the boundaries of which are pointed out to the buyer, not to be actionable. Gordon *v.* Parmelee, 2 Allen 212.

We do not mean to question these decisions in the slightest degree, but it is obvious that there must be a limit beyond which fraudulent representations cannot be made with impunity; and upon the whole we are of opinion that, if the plaintiff's evidence is believed, the representations made to him, under the circumstances in which they were made, went beyond that limit. When a man conveys "the notion of actual admeasurement" still more, when he says that he has measured a line himself and has found it so long, his statement has a stronger tendency to induce the buyer to refrain from further inquiry than a statement of the contents of a lot without giving grounds for the estimate. If false, it is a grosser falsehood. It purports on its face to exclude the suggestion that it is a mere estimate which the other leaves open. If it is made at a sale by auction, where it is out of the question for a bidder to go and verify it before making his bid, it seems to us reasonable to say that the purchaser has a right to rely upon it, as was held in a very similar case in Connecticut, Stevens *v.* Giddings, 45 Conn. 507.

New trial granted.

What constitutes fraud.

MITCHELL, C. J., IN INGALLS *v.* MILLER,

121 Ind. 191 (1889).

Whether the alleged representations were such as the plaintiff had a right to rely upon, or whether they were of a character reasonably calculated to deceive such a person as he was, were questions of fact for the jury. Representations might be futile and harmless when addressed to an active, sagacious, well-informed man, and yet the same scheme might utterly undo a weak-minded, illiterate, old, or inexperienced man. "The design of the law is to protect the weak and credulous from the wiles and stratagems of the artful and cunning, as well as those whose vigilance and sagacity enable them to protect themselves." McKee *v.* State, 111 Ind. 378 (381).

The law is not blind to the fact that communties are composed of individuals of several degrees of intelligence and capacity, nor does it declare as matter of law what representation as to existing facts may, or may not, be relied upon.

Damage—a necesary element in action of tort for fraud.

NYE *v.* MERRIAM,

35 Vt. 438 (1862).

Appeal from judgment for plaintiff.

Case for fraud, in cheating in weighing a quantity of butter sold by plaintiff to defendant.

Plaintiff's evidence tended to prove that he sold defendant eleven tubs of butter at a specified price per pound; that the butter was delivered by plaintiff's father in plaintiff's absence; that defendant weighed the butter in presence of the father, and cheated in the weighing, marking

a false weight on each tub and also on a slip of paper given to the father.

Plaintiff subsequently met the defendant at Lebanon, N. H., and called upon him to pay the balance due for the butter. In relation to what took place between the plaintiff and the defendant on this occasion, the plaintiff testified as follows:

"The defendant felt bad because he could not pay me. I said if he could not pay me he must give me his note, as I had nothing to show. He asked how much it was. I told him I did not know, but supposed he could tell. He said he could not, that his papers were in his valise or trunk. I said I supposed it was about sixty dollars; he thought it was fifty-five or sixty dollars. I said I had been at considerable trouble hunting after him, and would call it sixty dollars. He assented, and gave me his note for sixty dollars and I came home. I had lost the paper that my father gave me, and did not know what the figures were. There was not a word said between us about fraud in the weight, and no allusion to it whatever."

Defendant's evidence tended to prove (among other things) that the note was given to cover and settle not only for the balance due for the butter, but also for plaintiff's claim for being cheated by the defendant in the weight.

The Court charged the jury that if the plaintiff satisfied them that the defendant purposely cheated in weighing the butter, still, if the plaintiff's claim for such fraud was mutually settled and adjusted by the parties, and included in said note, it would be a defense to the action, but that if the note was given merely in settlement of the balance due to the plaintiff for his butter, at its reported weight by the defendant, and with no reference whatever to the plaintiff's having been cheated by the defendant in the weight, then the plaintiff's right of action for such fraud was not thereby barred, even though the note given was large enough to cover the whole of the butter received by the defendant at the contract price; that if the facts in reference

to the settlement and giving of the note were just as stated by the plaintiff, they would not amount to a settlement of the fraud in the weight, if such existed.

Defendant excepted to the charge. Verdict for plaintiff.

ALDIS, J.: The jury have found that the defendant attempted to cheat the plaintiff in the weight of his butter; that he reported the weight to the plaintiff's father, and marked the tubs at from twenty to thirty pounds less than the true weight. The plaintiff was not present when the butter was weighed, and therefore had to rely on the paper the defendant gave his father containing the figures of the weight.

I. If the plaintiff settled with the defendant for the butter upon the basis of the weight as reported by the defendant, and afterwards discovered the fraud, he would, it is admitted, be entitled to recover for the fraud.

II. But the defendant claims that the case, standing on the plaintiff's testimony, shows that the plaintiff has suffered no damage; that although the defendant may have attempted a fraud, yet in fact he has not accomplished his attempt; but, on the contrary, has given his note to the plaintiff on settlement for more than the value of the butter at its true weight and contract price.

To sustain this action there must be both fraud and damage. A naked lie that causes no injury to another is not actionable. The lie must be relied upon, and must occasion damage.

The defendant claims, first, that the lie was not relied upon; and, secondly, that it did no damage, according to the plaintiff's own testimony; and that this view of the case was not presented to the jury. To determine this point we must consider the plaintiff's testimony, and the charge of the Court in regard to it.

The plaintiff, hearing that the defendant was about to go to California, and not to return to pay for the butter, went in search of him, and after going to New York and Boston, found the defendant at Lebanon, New Hampshire.

He called on the defendant for payment of the balance due for the butter. The defendant said he had no money. The plaintiff replied: "If you cannot pay me you must give me your note." "He, the defendant, asked how much it was. I told him I did not know, but supposed he could tell. He said that he could not; that his papers were in his valise. I said I supposed it was about sixty dollars. He thought it was fifty-five or sixty dollars."

It will be noticed that thus far nothing has been asked for by the plaintiff, or spoken of by either, but "payment of the balance due for the butter"; and that what that balance was, was what neither could exactly tell,—the plaintiff supposing it "about sixty dollars," and the defendant "fifty-five or sixty." The plaintiff then proceeds: "I said I had been at considerable trouble hunting after him, and would call it sixty dollars. He assented and gave me his note for sixty dollars." It is admitted that this note was large enough to cover the full amount of the butter at the contract price.

The plaintiff further said that he had lost the paper that his father gave him, and did not know what the figures were.

Now, upon this evidence it is clear that the defendant might justly have urged upon the jury, first, that the note was given solely for the balance due for the butter; that the remark as to his trouble in hunting after the defendant was not intended by him, or understood by the defendant, as making those expenses or that trouble a part of the consideration of the note, but only an entitling him equitably or morally to have the defendant's doubt whether the balance was fifty-five or sixty dollars solved in the plaintiff's favor. If given solely for the balance due for the butter, and it covered the whole balance according to true weight and contract price, we are at a loss to see what damages occasioned by the original false statement of the defendant has accrued to the plaintiff. The plaintiff does not appear to have incurred any expense or trouble on account of

the falsehood, or to have lost anything by it. He did not go in search of the defendant on account of it. The attempt to cheat was not consummated by payment or settlement at the lower weight.

Had he known all the facts as to the attempt to cheat, he could not have asked for more than the sixty dollars as the balance due him for the butter. Nor does it appear that the falsehood had worked him any injury for which he could have asked for further compensation.

Secondly, the defendant might also have justly insisted that to sustain this action the plaintiff must show that he relied upon the false statement in making the settlement.

The testimony of the plaintiff might fairly be claimed by the defendant as tending to show that the plaintiff could not recollect what the statement originally made by the defendant as to the weight was; that the plaintiff had lost the paper which the defendant gave to his father, and had forgotten its contents; that the defendant could not tell what the weight was, and did not renew or insist on the original falsehood; and that both parties acted on their own knowledge and judgment as to the weight, uninfluenced by the false statement of the weight as originally made.

If the plaintiff did not recollect the false statement,—did not know and could not tell what the balance due for the butter was, according to the original falsehood, nor what the figures were which indicated the false weight, but claimed a balance sufficient to cover the whole and true weight, and received it on settlement, we are at a loss to see how he can claim to have been defrauded.

The Court in the charge did not present the case to the jury in these two aspects, but seemed to hold that the original falsehood necessarily included damage, and gave a right for action for fraud in weighing, and that, unless such right to sue was discharged in the settlement, it remained in full vigor and that the plaintiff's testimony did not show it settled. For the reasons above given we think the charge erroneous, and that the judgment must be reversed.

Judgment reversed.

UNDUE INFLUENCE.

Contracts between persons related.

TUCKE ET AL. *v.* BUCHHOLZ,
43 Iowa 415 (1876).

Appeal from decree in favor of plaintiffs.

BECK, J.: The defendant married the mother of plaintiffs, who was then a widow, when the eldest of them was about nine years of age. From this time until they reached their majority he stood in the place of a father and exercised parental authority and control over plaintiffs. Their father died seized of the land in controversy, and devised to their mother a life estate therein, with remainder to the plaintiffs. Defendant, after his marriage with plaintiffs' mother, occupied the land and made valuable improvements thereon. The mother died after the oldest of the plaintiffs had attained his majority; defendant was thereupon appointed guardian for plaintiffs, who were then minors. After the three oldest of plaintiffs had become of age, they united in a bond obligating themselves to convey to defendant the land in controversy for the consideration of $500 to be paid to each, for which defendant executed his promissory notes payable at a future day, without interest. The other plaintiffs, upon reaching their majority, executed a like obligation. The plaintiffs in this action sued to set aside these contracts, on the ground that their execution was procured through the fraud of defendant, and undue influence exerted by him over them.

We think the evidence before us supports the decree rendered in the Circuit Court. From their earliest childhood the plaintiffs were subject to the authority of defendant, who stood, as to them, *in loco parentis*. The evidence shows that, while he was not unkind towards plaintiffs, he exerted his authority over them with a firm hand. They were unusually obedient, and entertained the respect for him due a parent. The evidence clearly shows

that the contracts were executed at his solicitation, and upon requests that, in effect, were commands. The plaintiffs, at the time of the execution of the instruments, were not of ordinary intelligence—certainly had not the acquaintance with business affairs usually possessed by persons of their age. They did not have a full knowledge of the extent of their interest in the lands. Defendant represented to one or more of plaintiffs that they were liable to lose the land, thus exciting their fears. The consideration he undertook to pay the plaintiffs for the property was less than half its value.

The record presents the case of defendant's standing *in loco parentis* to all the plaintiffs, and the guardian of all but one of them, procuring the execution of the contracts after their majority, but before they were emancipated from the habit of obedience and deference to him, by the exercise of his authority, by solicitation, and, in one instance, through fear excited by false representations.

The contract, besides, is unconscionable, the consideration therefor being greatly inadequate. Contracts between persons holding towards each other relations of this character are regarded by equity with jealousy; under its rules the rights of the weaker party will be protected, and the power and influence of the stronger, acquired by long habits of authority exercised and obedience rendered, will be restrained (1 Story's Eq., pp. 309, 317).

The decree of the Circuit Court, besides declaring the contract invalid, provides that plaintiffs recover $1,790 of defendant for the rent of the land since the plaintiffs arrived at their majority. The evidence supports this provision of the decree. It ought, however, to have further provided that the notes executed by defendant, which the evidence shows plaintiffs offered to surrender, be given up to the plaintiff. A decree will be rendered in this court conforming to the decree of the court below, with the condition just suggested that the promissory notes of defendant be delivered to him before it shall be operative.

Affirmed.

Dissent of ADAMS, J., does not concur in the conclusions of the foregoing opinion, so far as it affects the contracts of two of the plaintiffs, Joseph H. and Adam H. Tucke, which, he thinks, should be held valid, for the reason that, in his opinion, they were, at the time of the execution of the instruments, of such age as to authorize the conclusion that they were emancipated from the habit of obedience to defendant.

When contract of lender and borrower is voidable.

FRANK C. DUNCAN *v.* MILTON H. BUTLER,
47 Mich. 94 (1881).

Appeal from decree in favor of complainant.

MARSTON, C. J.: No extended discussion of the facts is deemed necessary in this case. The bill was filed to foreclose a mortgage given by Duncan, October 14, 1878, to complainant to secure the payment of a note for $5,000, drawing ten per cent. interest, payable semi-annually. The property covered by the mortgage was all the right, title and interest of Duncan in and to any real estate, situate in Michigan or elsewhere, which he acquired as heir at law or devisee under the last will and testament of his father, William C. Duncan. Duncan appeared, answered and afterwards filed a cross-bill, setting up substantially the same facts set forth in his answer, and asking relief.

It appears that Duncan was a young man of dissolute habits, a spendthrift and of not much business experience. Although he had an income of $100 per month from his father's estate, yet he seems to have been in want of money; he had previously borrowed from Mr. Butler, and early in October, 1878, made application for another loan. The first application was not entertained, but at a subsequent interview Butler informed him that he, Butler, owned 160

acres of land in Grand Traverse county, and that if he, Duncan, could use that land, and would take it at $3,200, he, Butler, would make the loan, but at the same time refused to do anything further until Duncan would go see the land and thus ascertain its character and value. Directions were given Duncan how to get to the land, and with a friend named Hill, Duncan started, got as far as Grand Rapids, remained there a day or two, returned to Detroit and informed Butler they had seen the land; that it was satisfactory and that Duncan would take it. Thereupon a conveyance of this land was made to Duncan, a due bill of Duncan's which Butler held for $47 was surrendered up; a credit of $199 interest upon a previous mortgage held by Butler was endorsed, and $1000 in cash was paid to Duncan. At the same time a policy of insurance upon Duncan's life was taken out and assigned to Butler, upon which the premium of $110.35 was paid, and $556.75 was retained by Butler to pay annual premiums on such policy thereafter as the same should become due, thus making up the sum of $5,000 for which Duncan gave his note and the mortgage in question to secure the same.

At the time of this transaction Duncan was about 25 years of age, and while there was an apparent fairness on the part of Butler, especially in requiring Duncan to examine the Grand Traverse lands, yet when we look into the entire matter we find it of so unconscionable a nature that a court of chancery could not lend its aid in enforcing it. The title to the Grand Traverse land was defective and the value thereof was but little, if any, over $1,000. Duncan knew nothing about the value of such lands, would not have known even had he examined them, and could have had no possible use for such lands except to raise money thereon, all of which facts were fully known to Butler. The security given by Duncan was ample, and why a policy of insurance should have been taken out and assigned to Butler we are at a loss to discover, and more especially the reason for Butler's retaining in his hands the full

amount of five years' annual premiums, while at the same time he had included such sums in his mortgage note and was receiving ten per cent. interest payable semi-annually thereon, although the money still remained in his own hands.

To state the transaction mildly, it was taking advantage of Duncan's weakness and anxiety, and under the guise of an apparently fair business transaction, exacting an usurious interest which a court of equity cannot sanction. In so far as the parties can be restored to their former position they should be, and the moneys received by Duncan he should pay with interest thereon as he agreed.

The decree below must be reversed, and one entered giving Duncan the right to reconvey to Butler the Grand Traverse lands; that Butler's mortgage be held good for the $1,000 paid, the amount of the due-bill, and endorsement upon the previous mortgage debt, and the premium paid upon the $5,000 insurance policy, with interest thereon from the date of each payment, conditional however that Butler reassign such policy to Duncan; and that if such sums are not paid within ninety days then that Butler proceed to sell the mortgaged premises. And the cause will be remanded to the court below to render and enforce a decree in accordance with this opinion, Duncan to recover costs of both courts.

Decree reversed.

Contracts between persons in confidential relationship

KLINE *v.* KLINE,

57 Pa. 120 (1868).

SHARSWOOD, J.: Upon a question arising in the Orphans' Court as to the right of the widow of Gabriel Kline to any share of his estate, an issue was directed to try the validity of an antenuptial contract between her and the

intestate, dated March 21, 1850, by which it seems to have been assumed that she had by anticipation renounced or released all her rights as a widow. Whether the instrument does bear that meaning is a question which does not arise on this record, has not been argued, and upon it, we desire to be understood, there is no opinion either expressed or to be implied in the judgment we now enter. The deed was executed by the parties a very short time before their marriage, and it was alleged on behalf of the widow that the circumstances of her intended husband were concealed from her and misrepresented in the writing itself, in consequence of which she was induced for a very inadequate consideration to subscribe it. Evidence tending to show this was given. It was contended on her part, that it was incumbent on the plaintiffs in the issue to show that Gabriel Kline fully informed her of the amount and extent of the property owned by him. Had the judge contented himself with giving a simple negative to this proposition, it would perhaps have been unexceptionable. But his charge was much broader, for he instructed the jury that, "the woman was bound to exercise her judgment and take advantage of the opportunity that existed to obtain information; if she did not do so it was her own fault. The parties were dealing at arm's length. He was not bound to disclose to her the amount or value of his property." This part of the charge was excepted to and is assigned for error.

There is perhaps no relation of life in which more unbounded confidence is reposed than in that existing between parties who are betrothed to each other. Especially does the woman place the most implicit trust in the truth and affection of him in whose keeping she is about to deposit the happiness of her future life. From him she has no secrets; she believes he has none from her. To consider such persons as in the same category with buyers and sellers, and to say that they are dealing at arm's length, we think is a mistake. Surely when a man and woman

are on the eve of marriage, and it is proposed between them, as in this instance, to enter into an antenuptial contract upon the subject of "the enjoyment and disposition of their respective estates," it is the duty of each to be frank and unreserved in the disclosure of all circumstances materially bearing on the contemplated agreement. It may perhaps be presumed in the first instance that such disclosure was made, but any designed and material concealment ought to avoid the contract at the will of the party who has been injured. Neither Judge Story nor any other elementary writer has pretended to give an exhaustive catalogue of those confidential relations which require the utmost good faith (*uberrima fides*) in all transactions between the parties: 1 Story's Eq., Sec. 215. That distinguished jurist, in commenting upon the class of cases in which secret and underhand agreements, in fraud of marital rights, have been relieved against in equity, remarks, that while they are meditated frauds on innocent parties, and upon that account properly held invalid, yet that the doctrine has "a higher foundation, in the security which it is designed to throw round the contract of marriage, by placing all parties upon the basis of good faith, mutual confidence and equality of condition." 1 Story's Eq., Sec. 267.

If, indeed, this agreement was intended to debar the wife of all future right to any share of her husband's estate, in case she survived him, it was a most unequal and unjust bargain. It holds out the idea in the recital that his only property was the house and lot he then occupied, while the jury might have inferred from the evidence that he was worth at that time ten times its value. It bestows on her a portion of the house for life, with her own household goods which she owned before marriage, and the small annuity of $40 a year or about 11 cents a day to feed and clothe her, to find medical attendance and nursing for her when sick, and to bury her decently when she died. If, as has happened, she should find herself a solitary widow, without children, at the advanced age of seventy, such a

pittance leaves her to be an object of private charity or public relief. To say that she was bound when the contract was proposed to exercise her judgment, that she ought to have taken advantage of the opportunity that existed to obtain information, and that if she did not do so it was her own fault, is to suggest what would be revolting to all the better feelings of woman's nature. To have instituted inquiries into the property and fortune of her betrothed would have indicated that she was actuated by selfish and interested motives. She shrank back from the thought of asking a single question. She executed the paper without hesitation, and without inquiry. She believed that he would propose nothing but what was just, and she had a right to exercise that confidence. She lived with him seventeen years, for aught that appears, as an affectionate and faithful helpmate, and no doubt largely assisted in accumulating the fortune—at least of $15,000—of which he died in possession according to the evidence. We think there was error in the charge and accordingly

Judgment reversed and new trial ordered.

DURESS

What constitutes duress

MORSE *v.* WOODWORTH,

155 Mass. 233 (1891).

Appeal from judgment for plaintiff.

The plaintiff was a clerk in the defendant's store. He was accused of embezzling money from the defendant's store and when threatened with arrest he surrendered to the defendant certain notes which he held against the defendant and signed a release of his claim on the notes. This is an action to recover the value of the notes which, the plaintiff contends, were surrendered under duress.

KNOWLTON, J.: The only remaining exceptions relate to the requests of the defendant and the rulings of the Court in regard to duress. The plaintiff contended that he gave up the note, and signed the release under duress by threats of imprisonment. The question of law involved is whether one who believes and has reason to believe that another has committed crime, and who, by threats of prosecution and imprisonment for the crimes overcomes the will of the other, and induces him to execute a contract which he would not have made voluntarily, can enforce the contract if the other attempts to avoid it on the ground of duress.

Duress at the common law is of two kinds, duress by imprisonment and duress by threats. Some of the definitions of duress *per minas* are not broad enough to include constraint by threats of imprisonment. But it is well settled that threats of unlawful imprisonment may be made the means of duress, as well as threats of grievous bodily harm. The rule as to duress *per minas* has now a broader application than formerly. It is founded on the principle that a contract rests on the free and voluntary action of the minds of the parties meeting in an agreement which is to be binding upon them. If an influence is exerted on one of them of such a kind as to overcome his will and compel a formal assent to an undertaking when he does not really agree to it, and so to make that appear to be his act which is not his but another's, imposed on him through fear which deprives him of self-control, there is no contract unless the other deals with him in good faith, in ignorance of the improper influence, and in the belief that he is acting voluntarily.

To set aside a contract for duress it must be shown, first, that the will of one of the parties was overcome, and that he was thus subjected to the power of another, and that the means used to induce him to act were of such a kind as would overcome the mind and will of an ordinary person. It has often been held that threats of

civil suits and of ordinary proceedings against property are not enough, because ordinary persons do not cease to act voluntarily on account of such threats. But threats of imprisonment may be so violent and forceful as to have that effect. It must also be shown that the other party to the contract is not, through ignorance of the duress or for any other reason, in a position which entitles him to take advantage of a contract made under constraint without voluntary assent to it. If he knows that means have been used to overcome the will of him with whom he is dealing, so that he is to obtain a formal agreement which is not a real agreement, it is against equity and good conscience for him to become a party to the contract, and it is unlawful for him to attempt to gain a benefit from such an influence improperly exerted.

A contract obtained by duress of unlawful imprisonment is voidable. And if the imprisonment is under legal process in regular form, it is nevertheless unlawful as against one who procured it improperly for the purpose of obtaining the execution of a contract; and a contract obtained by means of it is voidable for duress. So it has been said that imprisonment under a legal process issued for a just cause is duress that will avoid the contract if such imprisonment is unlawfully used to obtain the contract. Richardson *v.* Duncan, 3 N. H. 508.

It has sometimes been held that threats of imprisonment, to constitute duress, must be of unlawful imprisonment. But the question is whether the threat is of imprisonment which will be unlawful in reference to the conduct of the threatener who is seeking to obtain a contract by his threat. Imprisonment that is suffered through the execution of a threat which was made for the purpose of forcing a guilty person to enter into a contract may be lawful as against the authorities and the public, but unlawful as against the threatener, when considered in reference to his effort to use for his private benefit processes provided for the protection of the public and the punishment

of crime. One who has overcome the mind and will of another for his own advantage, under such circumstances, is guilty of a perversion and abuse of laws which were made for another purpose, and he is in no position to claim the advantage of a formal contract obtained in that way, on the ground that the rights of the parties are to be determined by their language and their overt acts, without reference to the influences which moved them. In such a case, there is no reason why one should be bound by a contract obtained by force, which in reality is not his but another's.

We are aware that there are cases which tend to support the contention of the defendant. But we are of opinion that the view of the subject heretofore taken by this Court, which we have followed in this opinion, rests on sound principles, and is in conformity with most of the recent decisions on such cases, both in England and America.

We do not intimate that a note given in consideration of money embezzled from the payee can be avoided on the ground of duress, merely because the fear of arrest and imprisonment, if he failed to pay, was one of the inducements to the embezzler to make the note. But if the fact that he was liable to arrest and imprisonment is used as a threat to overcome his will and compel a settlement which he would not have made voluntarily, the case is different. The question in every such case is, whether his liability to imprisonment was used against him by way of a threat, to force a settlement. If so, the use was improper and unlawful, and if the threats were such as would naturally overcome the mind and will of an ordinary man, and if they overcame his, he may avoid the settlement. The rulings and refusals to rule were correct.

Exceptions overruled.

What constitutes duress

GALUSHA ET UX. *v.* SHERMAN ET AL.,

81 N. W. (Wis.) 495 (1900).

Action by D. H. Galusha and wife against Bradley B. Sherman and others. Judgment for plaintiffs. Defendant's appeal. Affirmed.

Action in equity to set aside a note and mortgage on the ground of duress. The issues made by the pleadings sufficiently appear from the facts found by the trial court, which are in substance as follows: October 29, 1894, Bradley B. Sherman, claiming to have been injured by eating impure meat, believing it to be wholesome, which was furnished to him for food by D. H. Galusha with knowledge, or reasonable means of knowledge, of its character, commenced an action against Galusha to recover compensation for such injury to the amount of $5000. A. J. Sutherland was Sherman's attorney. He employed J. H. Langdon to serve the summons and complaint, which service he performed and then advised Galusha to settle the claim, accompanying such advice by an assertion that if he did not do so he would be prosecuted criminally and sent to state's prison for from three to fourteen years. Langdon induced Galusha to accompany him to Sutherland's office, where he was induced to mortgage his farm for $1000 to secure a note for that amount payable in three years, with interest thereon at the rate of 8 per cent. per annum in settlement of the controversy. Sherman assigned the note and mortgage to Sutherland and the latter assigned the same to H. V. Scanlon, both assignments being recorded November 5, 1894. Galusha was a man of little education and experience, of a nervous temperament and easily frightened. The fact that a claim was made against him for more than he was worth, accompanied by threats of imprisonment for a long term of years if he did not settle it, deprived him of his freedom of will, and while he was in that condition the note and mortgage were procured. Such note and mortgage

were given without consideration. The plaintiff, Henrietta Galusha, signed the note and mortgage in the absence of her husband, and in such a state of fear and excitement, caused by threats made to her, that it was not her voluntary act. The mortgaged property was worth $3000. Defendant Scanlon is not the bona fide purchaser of the note and mortgage. On such facts judgment was awarded to plaintiffs, declaring the note and mortgage null and void and requiring them to be surrendered for cancellation, and for costs against defendants. There was evidence tending to prove that at Sutherland's office Galusha was locked in a room with Sutherland, and there again threatened with arrest and imprisonment for from three to fourteen years if he did not settle, and that such threats were accompanied with such demonstrations on the part of Sutherland as to greatly distract Galusha and put him in fear of personal violence.

MARSHALL, J.: It (duress) is a branch of the law that, in the process of development from the rigorous and harsh rules of the ancient common law, has been so softened by the more humane principles of the civil law and of equity, that the teachings of the older writers on the subject, standing alone, are not proper guides. The change from the ancient doctrine has been much greater in some jurisdictions than in others. There are many adjudications based on citations of authorities not in themselves harmonious, and many statements in legal opinions based on the ancient theory of duress, which together create much confusion on the subject, not only as it is treated by text writers but by judges in legal opinions.

Anciently, duress in law by putting in fear could exist only where there was such a threat of danger to the object of it as was deemed sufficient to deprive a constant and courageous man of his free will, and the circumstances requisite to that condition were distinctly fixed by law; that is to say, the resisting power which every person was bound to exercise for his own protection was measured,

not by the standard of the individual affected, but by the standard of a man of courage; and those things which could overcome a person, assuming that he was a prudent and constant man, were not left to be determined as facts in the particular case, but were a part of the law itself. Co. Litt. 253. * * *

Early in the development of the law, the legal standard of resistance that a person was bound to exercise for his own protection was changed from that of a constant or courageous man to that of a person of ordinary firmness. That will be found by reference to some of the earlier editions of Chitty on Contracts. See I Chit. Cont. (11th ed.), p. 272. But the ancient theory that duress was a matter of law to be determined prima facie by the existence or non-existence of some circumstance demand in law sufficient to deprive the alleged wronged person of freedom of will power, was adhered to generally, the standard of resisting power, however, being changed, so that circumstances less dangerous to personal liberty or safety than actual deprivation of liberty or imminent danger of loss of life or limb, came to be considered sufficient in law to overcome such power. The oppressive acts, though, were still referred to as duress, instead of the actual effect of such acts upon the will power of the alleged wronged person. It is now stated, oftener than otherwise, in judicial opinions, that in determining whether there was or was not duress in a given case, the evidence must be considered, having regard to the assumption that the alleged oppressed person was a person of ordinary courage. * * * Duress, in its broad sense, now includes all instances where a condition of mind of a person, caused by fear of personal injury or loss of limb, or injury to such person's property, wife, child, or husband, is produced by the wrongful conduct of another, rendering such person incompetent to contract with the exercise of his free will power, whether formerly relievable at law on the ground of duress or in equity on the ground of wrongful compulsion.

The making of a contract requires the free exercise of the will power of the contracting parties, and the free meeting and blending of their minds. In the absence of that, the essential of a contract is wanting; and if such absence be produced by the wrongful conduct of one party to the transaction, or conduct for which he is responsible, whereby the other party, for the time being, through fear, is bereft of his free will power, for the purpose of obtaining the contract, and it is thereby obtained, such contract may be avoided on the ground of duress. There is no legal standard of resistance which a party so circumstanced must exercise at his peril to protect himself. The question in each case is, was the alleged injured person, by being put in fear by the other party to the transaction for the purpose of obtaining an advantage over him, deprived of the free exercise of his will power, and was such advantage thereby obtained? If the proposition be determined in the affirmative, no matter what the nature of the threatened injury to such person, or his property or the person or liberty of his wife or child, the advantage thereby obtained cannot be retained.

The idea is that what constitutes duress is wholly a matter of law and is simply the deprivation by one person of the will power of another by putting such other in fear for the purpose of obtaining, by that means, some valuable advantage of him. The means by which that condition of mind is produced are matters of fact, and whether such condition was in fact produced is usually wholly a matter of fact, though of course the means may be so oppressive as to render the result an inference of law. It is a mistaken idea that what constitutes duress is different in case of an aged person or a wife or a child than in the case of a man of ordinary firmness. As said in Wolf *v.* Bluhm (95 Wis. 257), the condition of mind of a person produced by threats of some kind, rendering him incapable of exercising his free will, is what constitutes duress. The

means used to produce that condition, the age, sex, and mental characteristics of the alleged injured party, are all evidentiary, merely, of the ultimate fact in issue, of whether such person was bereft of the free exercise of his will power. Obviously, what will accomplish such result cannot justly be tested by any other standard than that of the particular person acted upon. His resisting power, under all the circumstances of the situation, not any arbitrary standard, is to be considered in determining whether there was duress. The more modern text writers so state the law to be. * * *

The true doctrine of duress, at the present day, both in this country and England, is that a contract obtained by so oppressing a person by threats regarding his personal safety or liberty, or that of his property, or of a member of his family, as to deprive him of the free exercise of his will and prevent the meeting of minds necessary to a valid contract, may be avoided on the ground of duress, whether the oppression causing the incompetence to contract be produced by what was deemed duress formerly, and relievable at law as such, or wrongful compulsion remediable by an appeal to a court of equity. The law no longer allows a person to enjoy, without disturbance, the fruits of his iniquity, because his victim was not a person of ordinary courage; and no longer gauges the acts that shall be held legally sufficient to produce duress by any arbitrary standard, but holds him who, by putting another in fear, shall have produced in him a state of mental incompetency to contract, and then takes advantage of such condition, no matter by what means such fear be caused, liable at the option of such other to make restitution to him of everything of value thereby taken from him. * * *

An arbitrary rule, that a threatened lawful arrest and imprisonment implying harsh or unreasonable use of criminal process, and where no warrant has been issued

and there is no danger of the threat being immediately carried out, is not sufficient to produce duress, seems unreasonable. Such, however, is the doctrine of the Supreme Court of Maine, and the cases supporting it will be found very generally cited by text writers and judges. That rule goes naturally with the doctrine that every person, without regard to actual mental power, is bound to come up to the standard of average men in that regard or suffer the consequences. * * *

Judgment affirmed.

Chapter V
LEGALITY OF OBJECT

Sunday contracts

A. COOK SONS, APPELLANT, *v.* J. B. FORKER, 193 Pa. 461 (1899).

MITCHELL, J.: The original statement on the promissory notes having been amended, the only form of the action with which we are concerned is for money had and received.

Certain notes of one Weston were discounted by plaintiffs on Sunday, and a check for the proceeds given by plaintiffs to defendant on the same day, but dated as of the day following. The defendant indorsed the check on the Sunday it was given, but the money was drawn on it by the indorsees on the following Wednesday. This is the money had and received which is the cause of action declared upon in the amended statement. The Court properly held that there could be no recovery on the note, but the action for the money stands on different ground. As to it the contract was not complete or executed on Sunday. Its object on the part of the defendant was to obtain the money on the discounted notes before their maturity, and it was not carried out until the money was obtained. The check in the meantime was merely a part of the incomplete Sunday agreement, and as such either party could have refused to go further with it. But when the holder presented and the plaintiff paid it both parties ratified and reaffirmed the transaction with all its consequences. This was done on a legal day, and made a legal and binding loan of the money. * * *

Contracts made on Sunday are not void in the sense that they do not admit of ratification, though so long as

they are executory the law will refuse to enforce them: Chestnut *v.* Harbaugh, 78 Pa. 473; and acts of ratification will make them new contracts which parties will be bound to perform: Uhler *v.* Applegate, 26 Pa. 140. It was accordingly held in the latter case that an agreement made on Sunday to extend the time of payment of a note, in consideration of the anticipation of part of the amount, became binding by the agreed prepayment on a legal day, Chief Justice Lewis saying, "It is not the intention of the law that its regard for the Sabbath day shall be made the means of perpetrating a fraud." So in Whitmire *v.* Montgomery, 165 Pa. 253, a note made and delivered on Sunday was held to be ratified and made good by a subsequent payment of interest on it.

Buying stock on margin

HOPKINS, RECEIVER OF LAUGHLIN AND McMANUS, *v.* O'KANE, APPELLANT,

169 Pa. 478 (1895).

Appeal from judgment for plaintiff.

Rule to open judgment.

From the depositions taken in support of the rule, it appeared that in November, 1892, defendant directed Laughlin and McManus, brokers, to purchase two hundred shares of Reading Railroad stock, for which he paid in full. The brokers received and retained the certificate for the stock, and in December, 1892, at defendant's request, resold the stock and retained the proceeds. Subsequently defendant directed the brokers to purchase shares of a traction company, and these in turn were sold by the brokers, and the proceeds retained by them. Similar transactions took place until on February 28, 1893, when defendant was

indebted to Laughlin and McManus in the sum of $2000, for which the judgment note in suit was given. Judgment was entered upon the note by the receiver of the firm of Laughlin and McManus, and subsequently defendant obtained a rule to open the judgment on the ground that the debt grew out of gambling transactions.

The court discharged the rule, and defendant appealed.

MITCHELL, J.: There is nothing in this case which would justify disturbing the judgment. It ought not to be necessary to say again after Peters *v.* Grim, 149 Pa. 163, and other cases, that a purchaser of stocks on margin is not necessarily a gambling transaction. Stocks may be bought on credit, just as flour or sugar or anything else, and the credit may be for the whole price or for a part of it, and with security or without it. "Margin" is security, nothing more, and the only difference between stocks and other commodities is that as stocks are more commonly made the vehicle of gambling speculations than some other things, courts are disposed to look more closely into stock transactions to ascertain their true character. If they are real purchases and sales, they are not gambling though they are done partly or wholly on credit.

The appellant himself testified that the first transaction involved in this case was his purchase of two hundred shares of Reading. "I bought them outright," and paid for them. Shortly afterwards he sold them, and on his order, the brokers bought traction stock, and retained the proceeds of the Reading as part payment for it. The subsequent transactions were of the same character, actual purchases and sales in which the stocks bought were received by the brokers for defendant, and those sold delivered by them for him to the purchasers. There was all the time on the broker's book a standing credit to appellant of the money received on his account from the sale of the Reading stock, and the subsequent debits and credits for the later pur-

chases and sales. The account closed unfortunately for appellant with a balance against him, but there is no allegation, certainly no evidence, that is not correct.

Judgment affirmed.

Interference with the administration of the law

LINDSAY *v.* SMITH AND HOSKINS, 78 N. C. 328 (1878).

BYNUM, J.: This is an action for a breach of covenant. The defendants demur to the complaint, and the facts are these: On February 17, 1874, an indictment was pending in the Superior Court of Guilford County, against the plaintiff, Lindsay, for erecting and maintaining a public nuisance, by constructing a dam across a certain creek, and ponding back the water thereof, which thereby became stagnant, fetid, and unwholesome, to the common nuisance of the citizens. That on said February 17th the covenant sued on was entered into, whereby the defendants covenanted under the penalty sued for, to cut, maintain and

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Editor's Note.—"In the first of these cases we adopted the following from the charge of Judge Hare in the court below: 'One who should undertake to make a bet or wager for another, and advance the money staked, would have no right of action against his principal in the event of loss.' In the second we said: 'As a general rule money loaned for the specific purpose that it shall be used by the borrower to do an action in violation of law, and has been so used, cannot be recovered back by the lender. It is not enough to defeat recovery by the lender that he knew of the borrower's intention to illegally appropriate the loan; he must know that the borrower is purposing the specific illegal use, and must be implicated as a confederate in the transaction'; Wharton Cont. 341-2-3. 'Where stock-jobbing is illegal, money lent for the purpose of carrying it on cannot be recovered, supposing it was lent knowingly and with the purpose of furthering the illegal act: Id. 453. * * * Where a man lends money to another for the express purpose of enabling him to commit a specific unlawful act, and such act be afterwards committed by means of the aid so received, the lender is a *particeps criminis.*'"—Brown, J., in Freely *v.* Jacoby, 220 Pa. 609 citing Fareira *v.* Gabell, 89 Pa. 89, and Waugh *v.* Beck, 114 Pa. 422.

keep in repair a certain ditch through the lands of the plaintiff; and that the plaintiff covenanted that when the work was done he would pay the defendants $50; and it was further covenanted as follows: "And it is further agreed by all the parties hereto, in consideration of the premises, that the indictment now pending in the Superior Court of Guilford County, against the said Alexander H. Lindsay, found at February Term, 1873, shall be discontinued and not proceed, and the prosecution thereof stopped without cost to the said Lindsay." * * * "And it is further agreed and understood by all the parties hereto, that this agreement is to be of no binding force on any of said parties whose names are signed hereto, until and unless the indictment hereinbefore spoken of shall be discontinued without cost to the said Lindsay." And this covenant is signed by the plaintiff and defendants.

Assuming this covenant to have been broken by the defendants, do these facts constitute a cause of action?

But the defendants' counsel contends with great ingenuity that there are two covenants in this sealed instrument, and that they are divisible, part being good, and part bad; that the contract of the defendants is to do two things; first, to dismiss the indictment, which is illegal and void, but second, to cut and keep up the ditch, which is legal and valid, and is the contract for the breach of which the action is brought. In regard to this proposition the general rule is that if there are several considerations for separate and distinct contracts, and one is good and the other bad, the one may stand and be enforced, although the other fails, under the maxim *"utile per inutile non vitiatur."* But where there is but one entire consideration for two several contracts, and one of these contracts is for the performance of an illegal act, the whole is void, as where one sum is to be paid for the doing of a legal and illegal act. Thus, where upon a contract for the hiring and service of a housekeeper at certain agreed wages it appears to have been a part of the contract that the housekeeper should cohabit with her

master, the whole will be void and the wages irrevocable by her. Rex *v.* Northingfield, 1 B. and Ad. 912. In Alexander *v.* Owen, 1 T. R. 227, the case was this: Upon a contract of sale of tobacco, it was agreed that counterfeit money should be taken in payment, and the tobacco having been delivered and the counterfeit money sent, the vendor refused to receive it and brought an action to recover the price of the tobacco, but the Court said that the sale could not be held to be good and the payment bad; if it was an illegal contract, it was equally bad for the whole, and the parties being in *pari delicto, melior est conditio defendentis.* Apply these principles to our case. There was but one indivisible consideration moving from the plaintiff, to wit, the sum of $50, and for that consideration the defendants covenant to do two things—the one legal and the other illegal. The consideration cannot be divided and enough of it assigned to support the contract to cut and maintain the ditch, but it, as it were, *per my et per tout,* enters into and supports both promises.

But there is another view equally fatal to this action. A part of the covenant is in these words: "And it is further agreed and understood by all the parties hereto, that this agreement is to be of no binding force on any of said parties whose names are signed hereto, until and unless the indictment hereinbefore spoken of shall be discontinued without cost to the said Lindsay." So the validity of the contract is expressly made to depend upon the performance of the very act which makes it invalid, to wit, the dismissal of the indictment. The covenants were not to be binding until the prosecution had been discontinued, and the contract to dismiss it was immoral and void. In such cases the law will leave the parties where it finds them.

Per Curiam. Judgment affirmed.

Restraint of trade

COTTINGTON, APPELLANT, *v.* SWAN, RESPONDENT,

128 Wis. 321 (1906).

SIEBECKER, J.: The only ground of objection urged to the complaint is that the contract upon which recovery is claimed by the plaintiff is in restraint of trade and the courts therefore will not enforce it nor consider the question of injury resulting from its breach. Contracts in restraint of trade have been repeatedly considered by this court and held to be void as against public policy, "unless limited, as to time, space and extent of trade, to what is reasonable under the circumstances of the case, because they tend to deprive the public of the services of the persons in those capacities in which they are most useful, and also tend to expose the public to the evils of monopoly." Tecktonius *v.* Scott, 110 Wis. 441. Condemnation of contracts of this nature has been quite universal by the courts, upon the ground that no person should be permitted to so contract as to preclude himself from following a lawful occupation for the benefit of himself and of those dependent upon him or to deprive the public of his industry. The vital question in the consideration of every such contract is whether the restraint imposed is reasonable under the circumstances with reference to "the situation, business, and objects of the parties," and if "the restraint contracted for appears to have been for a just and honest purpose, for the protection of the legitimate interests of the party in whose favor it is imposed, reasonable as between them and not especially injurious to the public, the restraint will be held valid." Hubbard *v.* Miller, 27 Mich. 15. In the following cases in this court involving contracts of this kind the determination rested upon these grounds, and if the restriction was found reasonable and just the contracts were sustained as valid; if they unreasonably restricted the parties so as to restrain

them from pursuing their occupations or deprived the public of their industry they were held invalid. Kellog *v.* Larkin, 3 Pin. 123.

Under the contract in question defendant sold his livery business and its good will to plaintiff and Ackley for a valuable consideration and agreed not to engage in that business, directly or indirectly, in the village of Bloomer while the purchasers or either of them "or their heirs, executors or administrators (should) be engaged in such business within said village." It is apparent that the restraint contracted for was a material consideration in inducing plaintiff and his associate to make this purchase from the defendant for the purpose of conducting a livery business in this village, and, under the circumstances, it seems reasonable to assume that defendant could not have secured the consideration obtained for such sale, but for the covenant not to engage in such a business in the village of Bloomer. That these considerations must have entered into the making of this contract is apparent from its terms. Are its terms unreasonably restrictive, and is the public thereby deprived of defendant's industry? Manifestly he is not precluded from pursuing this business anywhere outside of this village, and he may engage in any other business within or outside of the village. Under its terms the village may have this very business continued within its limits, for the agreement is that he shall not engage in it so long as it is conducted and carried on by the purchasers or their personal representatives or heirs. If they cease to conduct this business at any time, immediate or remote, then defendant may conduct it without restraint. The claim that such restraint would tend to subject the public of this village to a monopoly in this business as conducted by plaintiff is rather a remote speculation, for this field of enterprise for conducting such a business and competing with plaintiff for the public patronage is open to the whole world. Viewing the restrictive provision of this contract as applied to the situation of the parties it is manifest

that it was made for the honest purpose of affording a reasonable and fair protection to the interests of the plaintiff in whose favor it was made, and that it was a reasonable one as between them. Under these circumstances and conditions we do not find that the restriction imposed is unreasonable in its operation and likely to cause injury to the public, nor is it an unreasonable restraint upon defendant in pursuit of his occupation. This makes it a valid contract and entitles plaintiff to relief if defendant has breached it and caused him injury.

By THE COURT: The order appealed from is reversed, and the cause remanded with directions to enter an order overruling the demurrer and for further proceedings according to law.

Restraint of trade

DIAMOND MATCH CO. *v.* ROEBER,
106 N. Y. 473 (1887).

ANDREWS, J.: Two questions are presented: *First,* Whether the covenant of the defendant contained in the bill of sale executed by him to the Swift and Courtney and Beecher Company on the 27th day of August, 1880, "that he shall and will not, at any time or times within ninety-nine years, directly or indirectly, engage in the manufacture or sale of friction matches (excepting in the capacity of agent or employee of said The Swift and Courtney and Beecher Company), within any of the several States of the United States of America, or in the Territories thereof, or within the District of Columbia, excepting and reserving, however, the right to manufacture and sell friction matches in the State of Nevada and in the Territory of Montana," is void as being a covenant in restraint of trade; and *second,* as to the right of the plaintiff, under the special circum-

stances, to the equitable remedy by injunction to enforce the performance of the covenant. * * *

The law has, for centuries, permitted contracts in partial restraint of trade, when reasonable; and in Horner *v.* Graves (7 Bing. 735) Chief Justice Tindal considered a true test to be "whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public." When the restraint is general, but at the same time is coextensive only with the interest to be protected, and with the benefit meant to be conferred, there seems to be no good reason why, as between the parties, the contract is not as reasonable as when the interest is partial and there is a corresponding partial restraint. And is there any real public interest which necessarily condemns the one and not the other? It is an encouragement to industry and to enterprise in building up a trade, that a man shall be allowed to sell the good will of the business and the fruits of his industry upon the best terms he can obtain. If his business extends over a continent, does public policy forbid his accompanying the sale with a stipulation for restraint coextensive with the business which he sells? If such a contract is permitted, is the seller any more likely to become a burden on the public than a man who, having built up a local trade only, sells it, binding himself not to carry it on in the locality? Are the opportunities for employment and for the exercise of useful talents so shut up and hemmed in that the public is likely to lose a useful member of society in the one case and not in the other? Indeed, what public policy requires is often a vague and difficult inquiry. It is clear that public policy and the interests of society favor the utmost freedom of contract, within the law, and require that business transactions should not be trammeled by unnecessary restrictions. "If," said Sir George Jessel, in Printing Company *v.* Sampson, L. R. 19 Eq. Cas. 462, "there is one thing more than any other which public policy requires, it is that men

of full age and competent understanding shall have the utmost liberty of contracting, and that contracts when entered into freely and voluntarily, shall be held good, and shall be enforced by courts of justice." * * *

The boundaries of the States are not those of trade and commerce, and business is restrained within no such limit. The country, as a whole, is that of which we are citizens, and our duty and allegiance are due both to the State and Nation. Nor is it true, as a general rule, that a business established here cannot extend beyond the State, or that it may not be successfully established outside of the State. There are trades and employments which, from their nature, are localized; but this is not true of manufacturing industries in general. We are unwilling to say that the doctrine as to what is a general restraint of trade depends upon State lines, and we cannot say that the exception of Nevada and Montana was colorable merely. The rule itself is arbitrary, and we are not disposed to put such a construction upon this contract as will make it a contract in general restraint of trade, when upon its face it is only partial.

Editor's Note.—Later New York cases hold that contracts in restraint of trade throughout the whole country are legal when they operate simply to prevent a vendor of a business from engaging or competing with the vendee in a business which extends over the whole country. Leslie *v.* Lorillard, 110 N. Y. 519. Most of the later cases in other states uphold the same doctrine. 9 Cyc. 530.

Chapter VI

SPECIAL FORMALITY

NELSON *v.* BOYNTON,

44 Mass. 396 (1841).

Assumpsit, to recover the amount of two promissory notes dated April 1, 1828, each for $20, one payable in six months and the other in twelve months from date, with interest, after given by the father of the defendant to the plaintiff. In the course of the trial evidence was given that the plaintiff commenced suit against the father of the defendant on the notes and attached his real estate; that the present defendant, while said real estate was so under attachment orally promised the plaintiff to pay the amount of the notes if the plaintiff would discontinue his suit; and that the plaintiff discontinued the same accordingly. The judge instructed the jury that "this bargain, if they believe it to have been made, was an original undertaking by the defendant, for new consideration, and was not within the statutes of frauds." A verdict was returned for the plaintiff, and the defendant alleged exceptions to the ruling of the court.

SHAW, C. J.: Questions depending upon this branch of the statute of frauds are often attended with some perplexity, on account of the difference in laying down a general rule by which to distinguish a guarantee, a mere collateral promise for the debt of another, from the original agreement, upon a new and independent construction, when the subject of the contract is the debt or default of another.

Our own statute is in terms so nearly like the statute 22 Car. 11 to prevent frauds and perjuries, that the English authorities upon its construction are entitled to the

same consideration as upon questions of common law. The statute, in force when the promise in question was alleged to have been made, was this: "No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or misdoings of another person, unless an agreement, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." St. 1788, C. 16, Sec. 1. * * *

Some things under the statute seem to be well settled; and one is that to bind one person for the debt or default of another, there must not only be a promise or memorandum in writing, but such a promise must be made on good consideration. The statute does not vary the rule of common law, as to what constitutes a valid and binding promise; to every such promise, whether oral or written, there must be a good consideration. A promise without consideration is bad by the common law, as *nudum pactum;* a promise on good consideration, without writing, if for the debt of another, is bad by the statute. To bind one therefor for the debt or default of another, both must concur; first, a promise on good consideration, and, secondly, evidence thereof in writing. It is not enough therefore that a sufficient legal consideration for a promise is proved, if the object of the promise is the payment of the debt of another, for his account, and not with a view to any benefit to the promisor. * * *

In case one says to another, "deliver goods to A, and I will pay you," it is binding, though by parol, because A, though he receives the goods, is never liable to pay for them. But if, in this same case, he says, "I will see you paid," or, "I will pay, if he does not," or uses words equivalent, showing that the debt is in the first instant the debt of A, the undertaking is collateral and not valid, unless in writing. Matson *v.* Warham, 2 T. R. 80. * * * In these cases the same consideration, which is the consideration of the promise of the principal is a good consideration

for the promise of the surety or collateral promisor. The credit is given as well upon the original consideration of the principal, as the collateral promise of the surety, and is a good consideration for both. * * * The statute of frauds, says Mr. Justice Bayley, in Edwards *v.* Kelly, 6 M. & S. 209, as aimed at cases where a debt being due from one person, another engaged to pay it for him; but where one promised to pay the debt of another in order to release property in which he or his employers had an interest —to extricate property subject to distress, on promising to pay the amount due it was neither within the letter, or the mischief of the act. [After citing numerous cases, the Court continued.]

The rule to be derived from the decisions seems to be thus: that cases are not considered as coming within the statute when the party promising has for his object which he did not before enjoy, accruing immediately to himself; but where the object of the promise is to obtain the release of the person or property of the debtor, or other forbearances of benefit to him, it is within the statute. In the case of Fish *v.* Hutchinson, 2 Wils. 94, the plaintiff had sued a third person, and the defendant, in consideration that he would stay his action, promised to pay; the original debt still subsisting. It was held that it was promise for the debt of another and within the statute. So in Jackson *v.* Rayner, 12 John's 291, where the plaintiff had sued the defendant's son, although the defendant stated at the same time that he had taken the son's property and meant to pay his debts, it was held not binding without a promise in writing. * * *

Under the circumstances the Court are of opinion that the promise was within the statute of frauds; a promise to pay the debt of the father, and therefore, though made on good consideration, was not valid without a promise or memorandum of the agreement in writing. For although the effect of the discontinuance of the action was to discharge the attachment, yet that was incidental only, and

the leading object and purpose were the relief and benefit of the father, and not of the son. It does not appear that the son had any interest in the estate released, or object or purpose of his own to subserve. It is the ordinary case of a son becoming surety for the father's debt, in consideration of surceasing a suit or other forbearance, and therefore, not being in writing, is within the statute. And, although the forbearance would be a good consideration for such a promise, they proved to be written evidence, yet the consideration was not of such a character as to constitute a new and original transaction between these parties.

The Court below having expressed a different opinion, and instructed the jury that this bargain, if they found it had been so made, was an original undertaking by the defendant, for a new consideration, and was not therefore within the statute of frauds, and also that, notwithstanding the notes were not given up, nor the father discharged, still the Court decided, if there was a consideration for the promise, that the promise need not be in writing; this Court are of the opinion that the verdict rendered for the plaintiff, in pursuance of these instructions, must be set aside and a new trial granted.

Verdict set aside and a new trial granted.

PART II

OPERATION OF CONTRACT

Chapter VII

PRIVITY OF CONTRACTS

Privity—Lacking

BOSTON ICE CO. *v.* POTTER,
123 Mass. 28 (1877).

Contract on an account annexed for ice sold and delivered.

The judge found that the plaintiff could not maintain this action. Plaintiff alleged exceptions.

ENDICOTT, J.: To entitle the plaintiff to recover it must show some contract with the defendant. There was no express contract and upon the facts stated no contract is to be implied. The defendant had taken ice from the plaintiff in 1873, but, on account of some dissatisfaction with the manner of supplying, he terminated his contract, and made a contract for his supply with the Citizens' Ice Company. Plaintiff afterward delivered ice to the defendant for one year without notifying the defendant, as the presiding judge has found, that it had bought out the business of the Citizens' Ice Company, until after the delivery and consumption of ice. The presiding judge has decided that the defendant had a right to assume that the ice in question was delivered by the Citizens' Ice Company, and has thereby necessarily found that the defendant's contract with that company covered the time of the delivery of the ice.

There was no privity of contract established between the plaintiff and defendant, and without such privity the possession and use of the property will not support an implied *assumpsit*. Hill *v.* Snell, 104 Mass. 173. * * * No presumption of assent can be implied from the reception and use of the ice, because the defendant had no knowledge that it was furnished by the plaintiff, but supposed that he had received it under the contract made with the Citizens' Ice Company. Of this change he was entitled to be informed.

A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract, as when he contracts with another to paint a picture, or write a book, or furnish articles of a particular kind, or when he relies upon the character or qualities of an individual, or has, as in this case, reasons why he does not wish to deal with a particular party. In all these cases, as he may contract with whom he pleases, the sufficiency of his reason for so doing cannot be inquired into. If the defendant, before receiving the ice or during its delivery, had received notice of the change, and that the Citizens' Ice Company could no longer perform its contract with him, it would then have been an undoubted right to have rescinded the contract and to decline to have it executed by the plaintiff. But this he was unable to do, because the plaintiff failed to inform him of that which he had a right to know. Orcutt *v.* Nelson, 1 Gray 536. * * * If he had received notice and continued to take the ice as delivered a contract would be implied. Mudge *v.* Oliver, 1 Allen 74.

There are two English cases very similar to the case at bar. In Schmaling *v.* Thomlinson, 60 Tunt. 147, a firm was employed by the defendants to transport goods to a foreign market, and transferred the entire employment to the plaintiff, who performed it without the privity of the defendant, and it was held that he could not recover com-

pensation for his services from the defendants. The case of Bolton *v.* Jones, 2 H. and N. 564, was cited by both parties to the argument. There the defendant, who had been in the habit of dealing with one Brockelhurst, sent a written order to him for goods. The plaintiff, who had on the same day, bought out the business of Brockelhurst, executed the order without giving the defendant notice that the goods were supplied by him and not by Brockelhurst, and it was held that the plaintiff did not maintain an action for the price of goods against the defendant. * * *

The implied *assumpsit* arises upon the dealings between the parties of the action and cannot arise from the dealings between the defendant and the original contractor to which the plaintiff was not a party.

Exceptions overruled.

Privity—Lacking

SARAH MELLEN, ADMINISTRATRIX, *v.* SHILOMETH S. WHIPPLE,

1 Gray (Mass.) 317 (1854).

Action of contract, brought by the administratrix of Michael Mellen, on December 20, 1851. The declaration avers that "the defendant is indebted to the plaintiff for the following cause of action: On June 1, 1844, one John M. Rollins, for a good and sufficient consideration, made and delivered to Charles Ellis and John M. Mayo (then partners under the firm of Ellis & Mayo), his note for the sum of $500, payable to said Ellis & Mayo or order in three years from date, with interest thereon at the rate of 6 per cent. per annum, payable semi-annually; and also made to said payees, to hold to themselves, their heirs and assigns, as security for the payment of said note, a mort-

gage deed of the same date, of a certain lot of land situated at the corner of Curve Street and Harrison Avenue, in Boston, and more particularly described in said deeds. Said John M. Rollins afterward, to wit, on April 8, 1845, by his deed of that date, conveyed the equity of redemption of said estate to Shilometh S. Whipple, the defendant; and said deed contained the following clause: 'The said granted premises are subject to a mortgage for $500 with interest; said interest payable semi-annually; which mortgage, with the note for which it was given, the said Whipple is to assume and cancel.' Said Whipple accepted said deed, entered upon the said estate, and paid the interest on said note to the said mortgagees and their assigns to June 1, 1848; and said Michael Mellen, the plaintiff's intestate, in his lifetime became, by regular assignment, transfer, endorsement and delivery, for valuable consideration, possessed of said mortgage and the note for $500 secured thereby; and said Whipple became by law indebted to said intestate in the amount of said note; and said Michael Mellen is since deceased, and the plaintiff was duly appointed administratrix of his estate; and the said Whipple is now justly indebted to the plaintiff for the amount of said note of $500 and interest thereon from June 1, 1848; and promised the plaintiff to pay the same; yet, though often requested has not paid the same." To this declaration the defendant demurs, "and alleges and assigns for cause of this demurrer, that the declaration does not sufficiently set forth any legal cause of action."

METCALF, J.: * * * The general rule is, and always has been, that a plaintiff, in an action on a simple contract, must be the person from whom the consideration of the contract actually moved, and that a stranger to the consideration cannot sue on the contract. The rule is sometimes thus expressed. There must be a privity of contract between the plaintiff and defendant, in order to render the defendant liable to an action by the plaintiff on the contract. Crow *v.* Rogers, 1 Stra. 592.

Indebitatus assumpsit, for money had and received can be maintained, in various instances, where there is no actual privity of contract between the plaintiff and defendant, and where the consideration does not move from the plaintiff. In some actions of this kind a recovery has been had, where the promise was to a third person for the benefit of the plaintiff; such action being an equitable one that can be supported by showing that the defendant has in his hands money which, in equity and good conscience, belongs to the plaintiff, without showing a direct consideration moving from him, or a privity of contract between him and the defendant.

Most of the cases in this first class are those in which A. has put money or property into B.'s hands as a fund from which A.'s creditors are to be paid, and B. has promised, either expressly or by implication from his acceptance of the money or property without objection to the terms on which it was delivered to him, to pay such creditors. In such cases the creditors have maintained actions against the holder of the fund. Disborn *v.* Denaby, 1 D'Anv. Ab. 64. On close examination the case of Carnegie and Another *v.* Morrison and Another, 2 Met. 381, will be found to belong to the same class. The Chief Justice there said: "Bradford was indebted to the plaintiffs, and was desirous of paying them. He had funds, either in cash or credit, with the defendants, and entered into a contract with them to pay a sum of money for him to the plaintiffs. And upon the faith of that undertaking he forbore to adopt other measures to pay the plaintiff's debt."

By the recent English decisions, however, one to whom money is transmitted, to be paid to a third person, is not liable to an action by that person, unless he has agreed to hold it for him. And such was the opinion of Spencer, J., in Weston *v.* Barker, 12 Johns 282.

Cases where promises have been made to a father or uncle, for the benefit of a child or nephew, form a second class, in which the person for whose benefit the promise

was made has maintained an action for the breach of it. The nearness of the relation between the promisee and him for whose benefit the promise was made, has been sometimes assigned as a reason for these decisions. And though different opinions, both as to the correctness of the decisions, and as to this reason for them, have often been expressed by English judges, yet the decisions themselves have never been overruled, but are still regarded as settled law. Dutton *v.* Pool, 1 Vent. 318, is a familiarly known case of this kind, in which the defendant promised a father, who was about to fell timber for the purpose of raising a portion for his daughter, that if he would forbear to fell it the defendant would pay the daughter £1000. The daughter maintained an action on this promise. Several like decisions had been previously made. * * *

The defendant has no money which in equity and good conscience belongs to the plaintiff. No funds of Rollins', either in money, property or credit, have been put into the defendant's hands for the purpose of meeting the plaintiff's claim on Rollins. The sale of the equity of redemption to the defendant did not lessen the plaintiff's security for the mortgage debt which Rollins owed her intestate, for that equity could not have been taken toward payment of that debt. Atkins *v.* Sawyer, 1 Pick. 351. There was no nearness of relation between Rollins and the plaintiff's intestate. Nor has the defendant had the use and occupation of the land of the plaintiff or of her intestate under a promise or under any legal liability to pay rent for it. * * *

There was no privity of contract between the plaintiff's intestate and the defendant, nor did the consideration of the defendant's promise move from her intestate. Rollins sold only an equity of redemption to the defendant, leaving the estate in fee in the mortgagee. The stipulation in the deed of the equity, that the defendant should pay the mortgage notes, was a matter exclusively between the two parties to that deed, and is nothing more than the law would require of the defendant in order that he might

derive any benefit from his purchase of the equity. The plaintiff still has the estate and also Rollins' personal responsibility to secure the mortgage debt.

Editor's Note.—RIGHTS OF THIRD PARTY.—The rights of third parties, like their liabilities, cannot as a rule be projected into contracts to which they are not parties. This is the common law rule adhered to in England, and followed by Massachusetts, Michigan, and some other States, but a different rule, which is followed in most of the States, was adopted in New York nearly a century ago.

1. A makes a contract with B by the terms of which he is to pay a certain sum of money to X, who is not a party to the contract and knows nothing about it at the time. When X learns of this arrangement, may he enforce the payment from A? At common law he cannot; according to the English rule, which has followed the common law, he cannot; the New York rule permits him to recover in certain cases.

2. H made a loan of $300 to F, stating at the time that he owed the amount to L. F, in consideration of the loan, promised to pay the amount to L on the following day. He failed to pay according to promise, and L sued him upon the promise to H. Under the New York rule L may recover, but the operation of the rule is limited to cases where there is a debt or duty owing by the promisee to the third party claiming under the promise.

Reasons for the New York rule: (1) It avoids a multiplicity of suits. In the illustration given, if L is obliged to bring an action against H, the latter would have to sue F in order to recover the amount. (2) It avoids the delays and costs incident to a number of suits. (3) It gives the right of action to the person who is most directly interested in enforcing the agreement. He is the direct beneficiary, and the one upon whom the greatest hardship would fall in the event of non-payment. (4) The right may be said to rest on an implied relation of agency between the third party and the person making the contract in his favor, which is subsequently validated by a ratification on the part of the third party acting as principal. Since the act of the agent is the act of the principal, this gives the third party a right of action upon a contract made for his benefit.

3. W contracted with P to sell and transfer to the latter all of its property and contracts, the transfer to be made on a certain date when the selling corporation was to be dissolved. It was provided in the agreement that P was to settle and discharge all the liabilities of W, existing at the time of the merger. Among these was the claim of B amounting to more than four thousand dollars. B sued on the promise. *Held:* That B should recover; that while the primary purpose of such provision may have been for the benefit of the selling company, it was also incidentally intended for the benefit of its creditors, and that a creditor of the former company could enforce such provision against the promisor as one made for its benefit. **Baker *v.* Pullman Car Company, 124 Federal 555 (1903).**

Chapter VIII

ASSIGNMENT

Assignment of rights and duties

SAMUEL GALEY, FOR USE OF A. G. AND J. H. SMITH, CO-PARTNERS, TRADING AS SMITH BROTHERS, *v.* W. L. MELLON, APPELLANT,

172 Pa. 443 (1896).

Assumpsit on a contract for drilling an oil well.

At the trial it appeared that on April 1, 1893, W. L. Mellon, of Pittsburgh, contracted in writing with Samuel Galey to drill a well for oil or gas on a farm in Washington County. By the terms of the contract Galey was to furnish all tools, cables, etc., at his own expense and risk, and the fuel, labor and hauling required in completing the well, and case it dry of water. Mellon was to furnish wood, rig, casing, machinery and water, and pay 90 cents per foot for the drilling. On the same day the contract was made, Galey, in consideration of $180, made a parol assignment thereof to Smith Bros., the appellees, and Smith Bros., who were experienced contractors and drillers, did the work under the contract. Smith Bros. were not sub-contractors. Defendant claimed that one of the wells drilled was defective, owing to the neglect or incapacity of Smith Bros.' superintendent, and that Galey had no right to assign the contract to Smith Bros.

Defendant's points were as follows:

1. That there is no privity of contract in this case between the use plaintiffs and the defendant arising out of any assignment, legal or equitable, of the contract made by Galey with Mellon, and the use plaintiffs are not entitled to

recover upon said contract, and the verdict of the jury must be for the defendant. *Answer:* Refused. (1) * * *

4. That the contract made by Mellon with Galey was for the personal services of Galey in the drilling of McCarty No. 3, and were not assignable, and the fact that the use plaintiffs in this case drilled the said well under an arrangement made by them with Galey gives them no right of action upon the Galey contract against Mellon. *Answer:* Refused. (4.)

FELL, J.: This action is founded upon a contract for drilling an oil well. The personal performance of the work by the legal plaintiff could not have been contemplated by the parties at the time the contract was made. The work of necessity required the labor and attention of a number of men, and it does not appear that because of his knowledge, experience or pecuniary ability, or for any other reason, Galey was especially fitted to carry it on. There is nothing of a personal nature about it, and its personal performance by him was not the inducement nor of the essence of the contract. The contract was assigned to Smith Bros., the use plaintiffs, and the work under it was done by them with the knowledge of the defendants from the beginning. The jury found that they were not sub-contractors suing upon a contract as to which they had no rights. It was competent for Galey to assign to them the executory contract with all of his rights under it, or after the completion of the work to assign to them the right to receive the amount due on settlement. In either event they had the right to use his name as legal plaintiff, but in neither would their rights rise higher than his. The action was tried on the right of the legal plaintiff to recover, the doors were opened to every defense available against him, and in no aspect of the case was the defendant prejudiced because of the form of the action.

Practically the question at the trial was whether the legal plaintiff was entitled to recover on the contract, and that depended upon whether the fault which ultimately re-

sulted in the destruction of one of the wells was chargeable to the defendant's field superintendent. The jury found that it was, and they had the aid of a charge by the learned trial judge which fully and clearly explains the facts and the law applicable to them.

The judgment is affirmed.

Assignment of proceeds

JAMES *v.* CITY OF NEWTON & ANOTHER,

142 Mass. 366 (1886).

This was a bill in equity against the City of Newton for $600 which had been assigned to the plaintiff. The City of Newton in its answer admitted that it had in its hands $600 due on account of this contract and stated that it was willing to pay said balance to such person or persons as should be justly entitled to receive the same.

FIELD, J.: The assignment in this case is a formal assignment, for value, of "the sum of six hundred dollars now due and to become due and payable to me" from the City of Newton, under and by virtue of a contract for building a grammar school house, and it is agreed that this sum "shall be paid out of the money reserved as a guaranty by said city," and the assignee is empowered "to collect the same." There is no doubt that it would operate as an assignment to the extent of $600, if there can be an

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Editor's Note.—A liability may be assigned with the consent of the party entitled, but this is in effect the rescission, by agreement, of one contract and the substitution of a new one in which the same acts are to be performed by different parties.

Or again, if A undertakes to do work for X which needs no special skill, and it does not appear that A has been selected with reference to any personal qualification, X cannot complain if A gets the work done by an equally competent person. But A does not cease to be liable if the work is ill done, nor can any one but A sue for payment. Devlin *v.* Mayor, 63 N. Y. 8.

assignment, without the consent of the debtor, of a part of a debt to become due under an existing contract; and the cases that hold that an order drawn on a general or a particular fund is not an assignment *pro tanto,* unless it is accepted by the person on whom it is drawn, need not be noticed. That a court of law could not recognize and enforce such an assignment, except against the assignor if the money came into his hands, is conceded. The assignee could not sue at law in the name of the assignor, because he is not an assignee of the whole of the debt. He could not sue at law in his own name, because the City of Newton has not promised him that it will pay him $600. The $600 is expressly made payable "out of money reserved as a guaranty by said city;" and, by the contract, the balance reserved was payable as one entire sum, and at law a debtor cannot be compelled to pay an entire debt in parts, either to the creditor or to an assignee of the creditor, unless he promises to do so. Courts of law originally refused to recognize any assignments of choses in action made without the assent of the debtor, but for a long time they have recognized and enforced assignments if the whole of the debt, by permitting the assignee to sue in the name of the assignor, under an implied power, which they hold to be irrevocable. Partial assignments such courts have never recognized, because they hold that an entire debt cannot be divided into parts by the creditor without the consent of the debtor. * * *

It is said that, in equity, there may be, without the consent of the debtor, an assignment of a part of an entire debt. It is conceded that as between assignor and assignee, there may be such an assignment. The law that, if the debtor assents to the assignment in such a manner as to imply a promise to the assignee to pay to him the sum assigned, then the assignee can maintain an action, rests upon the theory that the assignment has transferred the property in the sum assigned to the assignee as the consideration of the debtor's promise to pay the assignee, and that

by this promise the indebtedness to the assignor is *pro tanto* discharged. It has been held, by courts of equity which have hesitated to enforce partial assignments against the debtor, that if he brings a bill of interpleader against all the persons claiming the debt or fund, or parts of it, the rights of the defendants will be determined and enforced, because the debtor, although he has not expressly promised to pay the assignees, yet asks that the fund be distributed or the debt paid the different defendants according to their rights as between themselves; and the rule against partial assignments was established for the benefit of the debtor. Public Schools *v.* Heath, 2 McCarter 22.

In many jurisdictions, courts of equity have gone farther, and have held that an assignment of a part of a fund or debt may be enforced in equity by a bill brought by the assignee against the debtor and assignor while the debt remains unpaid. The procedure in equity is adapted to determining and enforcing all the rights of the parties, and the debtor can pay the fund or debt into court, have his costs if he is entitled to them, and thus be compensated for any expense or trouble to which he may have been put by the assignment. But some courts in equity have gone still farther, and have held that, after notice of a partial assignment of a debt, the debtor cannot rightfully pay the sum assigned to his creditor, and, if he does, that this is no defense to a bill by the assignee. The doctrine carried to this extent effects a substantial change in the law. Under the old rule, the debtor could with safety settle with his creditor and pay him, unless he had notice or knowledge of an assignment of the whole of the debt; under this rule, he cannot, if he have notice or knowledge of an assignment of any part of it. * * *

It is settled that an assignment of a part of a debt, if assented to by the debtor in such a manner as to imply a promise to pay it to the assignee, is good against a trustee process, or against an assignee in insolvency. Taylor *v.* Lynch, 5 Gray 49.

In Bourne *v.* Cabot, 3 Met. 305, the Court said: "The order of Litchfield on the defendant was a good assignment of the fund, *pro tanto,* to the plaintiff, and the express promise to the assignee, to pay him the balance when the vessel should be sold, constituted a legal contract."

It is also settled that an equitable assignment of the whole fund in the hands of the trustee is good against a trustee process, although the trustee has received no notice of the assignment until after the trustee process is served, and has never assented to it. Wakefield *v.* Martin, 3 Mass. 558.

In Macomber *v.* Doane, 2 Allen 541, the Court said: "An order constitutes a good form of assignment, it being for the whole sum due or becoming due to the drawer, and it need not be accepted to make it an assignment." The order was for one month's wages, which, as subsequently ascertained, amounted to $37.50, but it was given as security for groceries furnished and to be furnished; and, on the day of the service of the writ, the defendant owed the plaintiff for groceries $28.79, and the remaining $8.71 was held by the trustee process. * * *

Welch & Mandeville, 1 Wheat. 233, was an action of covenant broken, brought by Prior in the name of Welch against Mandeville, who set up a release by Welch, to which Prior replied that Welch, before the release, had assigned the debt due by reason of the covenant to him, of which the defendant had notice. The Court consider the effect of certain bills of exchange, and say, "But where the order is drawn either on a general or a particular fund, for a part only it does not amount to an assignment of that part, or give a lien as against the drawee, unless he consent to the appropriation by an acceptance of the draft;" that "a creditor shall not be permitted to split up a single cause of action into many actions, without the assent of his debtor;" and that "if the plaintiff could show a partial assignment to the extent of the bills, it would not avail him in support of the present suit." * * *

In Peugh *v.* Porter, 112 U. S. 737, the Court ordered that a decree be entered that Peugh, subject to certain rights in the estate at Winder, was entitled to one-fourth of a fund, by virtue of an assignment of one-fourth of the claim against Mexico, made before the establishment of the claim, from which the fund was derived, and before the fund was in existence, and declare the law to be that, "it is indispensable to a lien thus created that there should be a distinct appropriation of the fund by the debtor, and an agreement that the creditor should be paid out of it." In Robinson *v.* Bacon, 3 Greenl. 346, the order was for the payment of the whole of a particular fund and was held good. * * *

We think that there should be a decree that the city of Newton pay to the plaintiff $600, and that the remainder of the same due from the city, after deducting its cost, be paid to Gilkey, assignee.

So ordered.

Editor's Note.—Money to be earned under a contract to be made in the future is not assignable. Herbert *v.* Bronson, 125 Mass. 475.

PART III

INTERPRETATION OF CONTRACTS

Chapter IX

GENERAL RULES OF CONSTRUCTION

WILLIAM SUMMERS ET AL. *v.* HIBBARD, SPENCER, BARTLETT & CO.,

153 Ill. 102 (1894).

Several letters concerning the purchase and sale of certain iron and iron products passed between the defendant and plaintiff. The last letters of each are as follows:

"Summers Bros. & Co., Struthers, Ohio:

"Gentlemen—Your favor 4th is at hand. If you are willing to revise your ideas a little we can trade with you. You may enter our order for 5000 bdls. first-class com. sheet-iron, as follows: 500 bdls. March delivery; 500 bdls., April delivery; 1000 bdls., May delivery; 1000 bdls., June delivery; 1000 bdls., July delivery; 1000 bdls., August delivery. Prices to be: Nos. 22 and 24, $2.60; 25 and 26, $2.70; 27, $2.80. Chicago delivery, 60 days, or two per cent. cash in ten days.

"If you accept our offer you may enter us for March shipment 250 bdls., 26, 24x101 in., and 250 bdls., 27, 24x101 in.

"Awaiting your prompt reply, we are, very truly yours,

HUBBARD, SPENCER, BARTLETT & CO."

On March 11 appellants mailed to appellees an acceptance of their offer, as follows:

"All sales subject to strikes and accidents.

"Summers Bros. & Co., manufacturers of Box-Annealed Common and Refined Sheet-Iron.

"STRUTHERS, OHIO, March 11, 1889.

"To Hibbard, Spencer, B. & Co., Chicago:

"Mr. Charles: Dear Sir—Your favor of March 9 at hand. We accept your offer, 5000 bdls. iron, 500 March, 500 April, 1000 May, 1000 June, 1000 July, 1000 August. Prices, No. 27 at $2.80; 26 at

$2.70; 24 at $2.60. f. o. b. cars Chicago, 2 per cent. ten days from date of invoice. We also enter your order, 250 bdls., 26x101, and 250 bdls., 27x101. Mch. shipment.

"Respectfully yours,
"SUMMERS BROS & CO."

In the latter part of March and early part of April, 1889, there was further correspondence between the parties, which resulted in an addition to the original contract of 3000 bundles of like sheet-iron, at same figures, for July, August and September delivery.

Appellants delivered only 1847 bundles of sheet-iron under the first or original contract. They made no deliveries whatever under the second or additional contract. As an excuse for not making further deliveries they, on July 24, 1889, represented to appellees that the contracts were made "subject to strikes and accidents," and that they were prevented from filling the contracts in time by reason of breakages in their mills—and they still make, on this appeal, the same claims.

There was a deficit in the May delivery of 727 bundles, in the June delivery of 639 bundles, and in the July delivery of 787 bundles. July 20 was the date of the last delivery. Appellees bought on the market, of other parties, on August 3, 1889, 1000 bundles; on August 6, 1889, 2000 bundles; on August 19, 1500 bundles; and on August 24, 1000 bundles. These purchases were made in order to get iron to take the place of that which appellants had contracted to sell them. During the whole of September and into October the market price of sheet-iron kept up, being at no time lower than the prices paid in the latter part of August. The total of the sheet-iron delivered by appellants, added to that bought by appellees, was 700 bundles less than the amount that the appellants had contracted to deliver.

This suit was brought by appellees to recover from appellants the amount that they paid for the sheet-iron in excess of the contract price. They made no claim in respect to the 700 bundles. The amount of the excess, less deductions for unpaid shipments, was $1546.61. The Court in-

structed the jury to find in favor of appellees for that amount. From the final judgment rendered in the trial court there was an appeal to the Appellate Court, where that judgment was affirmed. The present appeal is from such judgment of affirmance.

BAKER, J.: It is insisted by appellants that the words "All sales subject to strikes and accidents," printed at the top of their letter-heads, must be considered in determining what the contract was, and that said words constituted an express condition that became a part of the contract between them and appellees. We do not so understand the case. Under date of March 1, 1889, appellees invited appellants to make them an offer of sale of a specified quantity of sheet-iron, to be delivered in certain designated months. On March 4 appellants made them an offer, as requested. On March 9, in their letter of that date, appellees declined to accept the offer received, and at the same time they submitted for consideration an offer of their own—an offer of purchase. This offer contained all the elements and terms of a precise and complete contract, and lacked only the assent thereto of the persons to whom it was addressed to make it such a contract. The offer was to buy a certain quantity of sheet-iron, of certain sizes, to be delivered in Chicago in specified quantities and at designated times, and to pay therefor certain prices at certain stated times, and appellees concluded their proposal by saying, "If you accept our offer, you may enter us for March shipment 250 bundles," etc. This offer was absolute and positive, and without any conditions, qualifications, or exceptions whatever. On March 11 appellants wrote to appellees: "Your favor of March 9 at hand. We accept your offer." And they thereupon proceeded to restate in their letter the terms of the proposal made to them. These two letters made the contract between the parties. The two preceding letters seem to us to be wholly immaterial. The mere fact that appellants wrote their acceptance on a blank form for letters, at the top of which were printed the words "All sales

subject to strikes and accidents," no more made those words a part of the contract than they made the other words there printed, "Summers Bros. & Co., Manufacturers of Box-Annealed Common and Refined Sheet-Iron," a part of the contract. The offer was absolute. The written acceptance which they themselves wrote was just as absolute. The printed words were not in the body of the letter or referred to therein. The fact that they were printed at the head of their letter-heads would not have the effect of preventing appellants from entering into an unconditional contract of sale.

In American Express Co. *v.* Pinckney, 29 Ill. 392, this court said: "In a case where the agreement is partly written and in part printed, the preference is always given to the written part." In that case the printed matter was in the body of the instrument, incorporated and mingled with the written matter. It would seem there is more reason and occasion for applying the principle of law there invoked in a case where, as here, the words in print are separate and apart from the writing that appears upon the paper, and in a place where one would not be likely to look for limitations upon that which is written.

When an instrument is in part written and in part printed, and these parts are apparently inconsistent, or there is a reasonable doubt upon the sense and meaning of the whole, the words in writing will control, because they are the immediate language and terms selected by the parties themselves for the expression of their meaning. (Alsagu *v.* St. Katherine's Dock Co., 14 M. & W. 796). In the case at bar it is inconsistent that the contract should be both an absolute contract and a conditional contract. The terms of payment in this contract were sixty days' time or two per cent. discount for cash in ten days. Suppose the words, "All sales not paid for on delivery to draw interest," had been printed on the letter-head. Can there be any doubt that the written terms would have controlled the printed words? Here there was a written provision that the iron was to be

delivered free on board the cars at Chicago. Suppose it had been printed on the letter-head that the manufacturers would not be responsible for iron after a delivery to a common carrier; would not the written provision have governed the contract?

Upon the whole, we are inclined to the opinion that the mere fact that the words in question were printed in the caption of the paper on which appellants wrote their unqualified acceptance of the contract proposed by appellees did not have the effect of reading them into the agreement thereby consummated; and appellants understood that some sort of an agreement was brought to a completion by their act, for in their letter they wrote: "We also enter your order for 250 bundles, etc., March shipment."

Appellants made a further claim that there was an implied condition in the contract, that would relieve them from performance if their mill plant, without any fault on their part, was so disabled as to make it impossible for them to make the iron that they contracted to deliver. The contract did not call for iron manufactured at their mill. It simply called for first-class common sheet-iron of certain specified sizes. There was nothing to prevent their filling the contract by going into the market and buying sheet-iron manufactured at other mills. Appellees seem to have experienced no difficulty, other than that of being forced to pay a higher price, when they went on the market and bought from other parties the sheet-iron contracted for, which appellants failed to supply. But even if the contract had been for sheet-iron of their own manufacture, the breakages in this mill would not have relieved them from liability. The general doctrine is that where parties, by their own contract and positive undertaking, create a duty or charge upon themselves, they must abide by the contract and make the promise good, and either do the act or pay the damages. (Steele *v.* Buck, 61 Ill. 343). Inevitable accident affords them no relief, for they are regarded as insurers to the extent of making good the loss. There is a principle of the law that, in contracts

in which the performance depends on the continued existence of a given or specified person or animal or thing, a condition is implied that the impossibility of performance arising from the perishing of the person, animal or thing shall excuse the performance. But there is no place in this case for the application of that rule.

There is no doubt of the correctness of the rule stated by appellants, that where delivery is required to be made by installments, the measure of damages will be estimated by the value at the time each delivery should be made. In the case at bar appellees made threats to buy in at seller's expense, but excuses rendered and promises made by appellants of frequent and large shipments deterred them from doing so. If delivery is postponed by agreement between the parties, the measure of damages is the difference between the contract price and the market price at the time the article is deliverable by the subsequent agreement, and where the time of delivery is postponed indefinitely, the measure of damages is the difference between the contract price and the market value at a reasonable time after demanding performance. Appellees admit that they had no legal right to buy in during the month of August more than 3159 bundles of sheet-iron, that being the quantity then due, under the original and additional contracts, on August 1. But the uncontroverted evidence is that the price of such iron remained firm during September and a part of October, being at no time lower than August prices. So the premature purchases worked appellants no injury, but were to their benefit. Besides this, it was held in Follansbee *v.* Adams, 86 Ill. 13, that the vendee may charge the vendor with the difference in prices without making any purchases, the result being the same, and the vendee being entitled to the benefit of his contract. * * *

The making of the written contracts being admitted at the trial, the Court having construed them and held that the printed line in the caption of the letters was no part of such contracts, and having resolved, as matter of law, that there

was no implied condition in them, growing out of their nature, the claimed deficit in deliveries not being denied, and there being no conflict of testimony in respect to the state of facts upon which the damages were to be based, there remained in the case no question that required submission to the decision of the jury, and it was not manifest error to direct a verdict for the plaintiffs, and instruct the jury at what amount to assess the damages. * * *

The judgment of the Appellate Court is affirmed.

Rules of construction

VARNUM & ASPINWALL ET AL. *v.* THURSTON, 17 Md. Repts. 470 (1861).

Bill in equity to enforce agreement. Appeal from judgment for complainant (Thurston). Defendant's appeal.

Cowles (one of the defendants), having made certain contracts for the purchase of coal lands, entered into an agreement with Varnum & Aspinwall by which these contracts were transferred to the latter, who were to provide the funds necessary to complete the contracts, and were then to hold the lands (subject to their claim to be reimbursed the cost thereof) for the joint benefit of themselves and Cowles in equal half parts, and to dispose of them thus: They are to form, under the general mining law, a company for mining coal on these lands, the capital of which shall be fixed at a sum equal to the value of the lands, to be divided into shares of $100 each, and convey to the company so

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Editor's Note.—A printed bill-head or letter-head cannot be allowed to control, modify or alter the terms of a contract which is clearly expressed in writing below it. Sturn *v.* Boker, 150 U. S. 312.

But when there is no such conflict, the provisions not being inconsistent, the written provisions will not supersede the printed ones. Michaelis *v.* Wolf, 136 Ill. 68.

formed these lands, in payment of the stock to be issued in their names, and shall, out of the stock so issued, sell sufficient to reimburse them the cost of the land and $15,000 agreed to be paid to Cowles, and which is to be treated as a charge upon the lands, and also raise not less than $200,000 as a working capital to the company, which, when so raised, shall be paid into the company for the benefit of the stockholders; and, after making the sales and payments aforesaid, shall next transfer one-twentieth part of the whole of said capital stock to the complainant (Thurston) and the balance of the stock then remaining shall belong one-half to Cowles and the other half to Varnum & Aspinwall. A company was formed, and its stock sold. * * *

The complainant in his bill insists that the defendants, Varnum & Aspinwall, were bound by their agreement with Cowles to form a company and transfer to the complainant, at all events and in any contingency, one-twentieth part of the whole capital stock of said company; and he further insists that they were bound to provide, at all events and in any contingency, a working capital for said company of at least $200,000, and the complainant therefore asks specifically for 500 shares (being one-twentieth of the capital stock of the company which had been formed), and that the said Varnum & Aspinwall might be required to supply said company with a working capital of $200,000. The complainant further insists that it was the duty of Varnum & Aspinwall to have formed said company within a reasonable time, and charges that they have been guilty of gross neglect of their duties in various specified particulars, and of inexcusable delay in forming the company, which caused, as a necessary consequence, accumulation of interest and loss of profits, and he claims an account for losses sustained by these alleged improper acts and neglects of Varnum & Aspinwall.

The counsel for the appellee urged the following rules of construction as applicable to the case:

1st. The agreement must be construed agreeably to the intention of the parties, existing at the time it was made. It must not be construed by any subsequent event nor by the result; and such intention must be the concurrent intention of both the contracting parties. Every word "agreement" (*aggregatio mentium*) imparts the assent of the minds of both parties to the same thing in the same sense, and *as between the parties and the agreement* the intention must be gathered from the agreement itself. This is an established rule of construction in all courts; equity may, and often does, control the *effect* and *operations* of an agreement, but this must not be confounded with its construction. Parson's Merc. Law 14.

2d. And where the language of an agreement is plain and unambiguous, or by just construction manifests the clear intention of the parties, there can be no implication of an inconsistent intention. 2 Gill 74, Benson *v.* Boteler.

3d. It is an established canon of construction that, in construing a written instrument the court should give meaning and operation to every clause and word, provided it can be done consistently with the intention of the parties, and to that end may look to the motives that led to the agreement, and to the object intended to be effected; and may also look to the surrounding circumstances and to the circumstance of the parties; and may suppose new and different aspects of the case from those which have actually arisen, in order to ascertain whether a suggested interpretation does or does not comport with the intention of the parties. 1 G. & J. 150, Wirgman *v.* Mactier.

4th. And it is also an established rule that, in the construction of a written paper of doubtful import or which is reasonably susceptible of two inconsistent interpretations, in relation to the right of one not a party to the agreement, that construction shall be adopted which is most beneficial to such third person.

TUCK, J., delivered the opinion of this court.

The only subject before us on this appeal is the construction of the agreement of January 24, 1853.

The rules of interpretation asserted on the part of the appellee cannot be questioned, but they are all subordinate to the leading principle, that the intention of the parties, to be collected from the entire instrument, must prevail, unless inconsistent with some rule of law. And the maxim that the words of a writing shall be taken most strongly against the party employing them "applies only to cases of ambiguity in the words, or where the exposition is requisite to give them lawful effect. It is a rule of strictness and rigor, and not to be resorted to but where other rules of exposition fail. The modern and more reasonable practice is to give to the language its just sense, and to search for the precise meaning, and one requisite to give due and fair effect to the contract, without adopting either the rule of a rigid or of an indulgent construction." 2 Kent, 556.

Applying these cardinal rules to the present instrument, we have not been able to reach the conclusion to which the able arguments of the appellee's counsel sought to direct us. We must regard the whole agreement, the nature of the transaction in hand, its objects and purposes, and the means and manner of accomplishing them, as disclosed by the instrument itself; and, looking to these, we cannot doubt that the parties designed that the right of the appellee should be contingent, and not fixed and certain, to the degree now contended for on his behalf.

The agreement and schedule show that Cowles had speculated in coal lands and made large purchases, which he transferred to Varnum & Aspinwall, who were to provide funds to meet his engagements. The third article expressly provides that they should hold the lands "subject to their claim, to be reimbursed the cost thereof, and all expenses in relation thereto," for the benefit of themselves and Cowles, as thereafter provided. A joint stock company was to be created, and these lands converted into stock, to be issued to the appellants, who were to deal with the shares as provided in the fifth article, on a portion of which the appellee mainly relies in support of his claim to priority.

Now, the first question that naturally arises here is whether it was designed that Varnum & Aspinwall should be in any worse condition after the formation of the company than before; that is to say, were they or not to hold the stock as they had held the lands, as a security for their outlay? We think that only one answer can be made to this inquiry, and that is that it was the intention that the stock should stand as a substituted security in place of the land, and that the fifth article must be deemed, as far as the appellants' reimbursement was contemplated by the parties, as intended to accomplish that end. Considering the merits of the case, we can see no possible objection to this view of the agreement, while considerations of justice demand it. The question, then, arises, is there anything in the fifth or any other article by which they have stripped themselves of the security provided by the third? If it were not for the words "one-twentieth part of the whole capital stock," we suppose that no such pretension could be advanced. But that clause does not stand alone. It appears to us to be impossible to separate it from the context, and give it the meaning contended for, without defeating the manifest object of the parties as to other ends contemplated at the time of making the agreement. It is said that these words created a positive and fixed right in the appellee to that portion of the stock, without reference to the result of sales or other contingency. We may here remark that if the parties had so intended, it was easy to have placed the mat ter beyond doubt. This clause is the last of the fifth article. by which certain duties had been imposed on the appellants, which it might be impossible for them to discharge if the appellee's construction were to prevail. We think the order of sentences and the phraseology imply something more than a succession of events; for the transfer to the appellee was to be made after certain other things were to have been done. Let us see what these requirements are. The appellants were, "out of the stock so issued to them, to sell sufficient to reimburse them the cost of the land,"

etc. Was not the whole stock placed at their disposal, if it required all? "Sufficient" means enough, what may be necessary to accomplish an object; and how any other effect can be ascribed to the word, as here employed, we do not perceive, unless we adopt the suggestion made at the bar, that it must be intended that the parties meant sufficient of the disposable stock. But here we would be met by the difficulty that if the agreement, as it stands, means one thing, we cannot, by implication, interpolate a word which would give it a different effect. The most reasonable idea, in case of any doubt upon the words, would be that those who had projected the enterprise, and advanced their means in furtherance of the common object, should, out of the property, be indemnified against loss, and not be postponed for the benefit of another, who, as far as the paper shows anything on the subject, had furnished no consideration for the stipulation in his favor. By the interpretation of the appellee, he would be preferred not only to Varnum & Aspinwall, as to their outlay, but also to Cowles as to his $15,000, "expended in obtaining the contracts, and in and about the lands," which is made a charge on the lands by the sixth article, as the claim of Varnum & Aspinwall had been by the third.

But suppose we confine ourselves to the last clause of the fifth article, on which reliance is placed by the appellee. We must take it all together, and then the inquiry is, what effect are we to give to the words "after" and "next"? It is said that these indicate only the order of time in which certain things were to occur. If this were so, it might happen that the appellee would never enjoy what he insists is a fixed and ascertained amount of stock, because the transfer was to be made after the sales and payment aforesaid; that is, sales of stock sufficient for all the purposes set forth in the preceding clause of the article, and until these ends were gratified we do not perceive how Varnum & Aspinwall could be called on to make the transfer. The words "one-twentieth of the whole of said stock" are certainly

plain enough, and sufficiently indicate the amount the appellee was to receive, but, taking the whole of the clause, and giving to every word the meaning which we think they may bear consistently with the objects of the transaction and the mode of their accomplishment, as defined in other parts, the most reasonable interpretation is that this expression should secure to the appellee the amount of stock mentioned, in preference to the division between the other parties, but not in priority over the claim that Varnum & Aspinwall might have for their outlay. This we take to be in harmony with the words of the entire instrument, and at the same time quite consistent with the equities of the transaction. For, although it may be assumed that the appellee, by force of the clause in his favor, had an interest which a court of equity would enforce, we do not suppose it can be regarded as of a higher dignity than that of the parties by whom the enterprise was commenced, and whose means were embarked in its prosecution, and for whose reimbursement express provision was made in the third and sixth articles. These are as plain in their words and meaning, when considered alone, as the clause relied on by the appellee, and would seem to address themselves to our acceptance as well; and both parties relying on separate clauses, the only safe guide is to consider them all as comprising one instrument, to be interpreted by the intent of the parties, to be gathered from the whole.

It is true that instruments cannot be construed by what parties may have done under them, 1 H. & G. 74, but we think that courts may regard the nature of the transaction and probable results; that is, such as may be supposed to have entered into the minds of the parties at the time the agreement was made; for justice seems to require that both parties should be bound by a consent of the mind to the same thing in the same sense. We suppose that all the parties concerned in this speculation—as speculators generally do—looked to large profits. None apprehended any loss, and in this confidence they did not provide in terms for

contrary results. But if loss had been apprehended, and they had purposed to provide for such contingency, can anyone believe that Cowles and Varnum & Aspinwall would have consented to purchase and pay for the lands, bear all the losses and save harmless the only person concerned, who does not appear to have advanced anything; we should rather say, allow him only to make a profit of the business?

The examples cited on the question of construction, from cases where wills and testaments were the subjects of consideration, we think, do not apply here. This case, and the like, should be governed by the principles recognized in deeds, and there are many in this court where priorities have been allowed, upon words and phrases, to which the rules observed in the construction of wills would have applied as reasonably as to the present agreement.

Decree reversed.

Editor's Note.—Twelve Rules of Construction.

1. Intent of parties as expressed in words must govern.
2. Words are to be taken in their ordinary sense.
3. In case of doubt preliminary negotiations ought to be considered.
4. Intention is not to be collected from detached parts, but from the whole of it.
5. Where there are several writings they will be construed together.
6. The contract includes all those things which the law implies as part of it.
7. A particular custom may be proved to vary the usual meaning.
8. Words are to be taken in the ordinary and popular sense.
9. Technical words are to be taken in a technical sense.
10. Where there is conflict between printing and writing the writing will prevail.
11. Words and phrases susceptible of two meanings, one of which will uphold the contract, and the other destroy it, the former will be adopted.
12. Where one construction will make a contract legal the other illegal, the former, if reasonable, will be adopted.—9 Cyc. 583 *et seq.*

PART IV

DISCHARGE OF CONTRACTS

Chapter X

DISCHARGE BY AGREEMENT

Waiver of condition allowing discharge

WEAVER *v.* GRIFFITH, APPELLANT,
210 Pa. 13 (1904).

Bill in equity by purchaser for specific performance of a contract to sell land. Error assigned was decree of specific performance.

PER CURIAM: The defendant might have terminated the contract under the clause that "in case the said party of the second part doth not make payment as above specified at the time herein stated, then this agreement is to be null and void, and all parties are to be released from all liabilities herein and all money previously paid forfeited." But the failure to make the payments at the stipulated times did not, of its own force, terminate the contract. It was not one of option, but of sale and purchase, and *prima facie* the time of payment was not of its essence. While a contract may provide that it shall be terminable at the will of either party, so that a purchaser may even terminate it by his own default, yet such effect will not be given to it unless the intent of both parties to that effect be made apparent by clear, precise and unequivocal language. The presumption is that the forfeiture clause is for the benefit of the vendor and enforceable at his election. Without such election and action the purchaser would not be released from his obligation to

pay, and equally the vendor would continue to be bound by his agreement to sell.

In the present case the Court below found as a fact that the defendant had not elected to enforce his right of forfeiture, but by his conduct had substantially waived it. Thus retaining his right to enforce the contract against the purchaser to buy, he equally kept alive his own obligation to sell.

Decree affirmed.

When right of discharge by condition subsequent is lost

RAY *v.* THOMPSON,

12 Cushing (Mass.) 281 (1853).

Assumpsit for the price of a horse sold to defendant. Defense, sale on condition that defendant might return the horse, and that he had returned it. Verdict for defendant.

Plaintiff offered to prove that defendant had so abused the horse that it was materially injured and lessened in value, and the plaintiff had refused in consequence to receive it back. This evidence was excluded, and plaintiff excepted to the ruling.

BY THE COURT: The evidence offered by the plaintiff ought to have been admitted, to prove, if he could, that the horse had been abused and injured by the defendant, and so to show that the defendant had put it out of his power to comply with the condition by returning the horse. The sale was on a condition subsequent; that is, on condition he did not elect to keep the horse, to return him within the time limited. Being on a condition subsequent, the property vested presently in the vendee, defeasible only on the performance of the condition. If the defendant, in the meantime, disabled himself from performing the condition, and

if the horse was substantially injured by the defendant by such abuse, he would be so disabled—then the sale became absolute, the obligation to pay the price became unconditional, and the plaintiff might declare as upon an *indebitatus assumpsit,* without setting out the conditional contract. Moss *v.* Sweet, 3 Eng. Law & Eq. 311.

New trial ordered.

Chapter XI

DISCHARGE BY PERFORMANCE

GILLESPIE TOOL CO. *v.* WILSON ET AL., 123 Pa. 19 (1888).

Assumpsit on a contract for drilling a well. Defense, non-performance. Non-suit. Plaintiff appeals.

Plaintiff agreed to drill for defendants a gas well 2,000 feet deep and five and five-eighths inches in diameter. In case salt water was struck, the well was to be eight inches in diameter in order to shut off the salt water. A well was dug to the depth of between 1,500 and 1,600 feet, when, owing to an accident, it had to be abandoned. Another well was then begun, and when at a depth of 800 feet plaintiff was notified that defendants held the contract was for the first well and would not be responsible for the second. Plaintiff continued and drilled the second well to a depth of 2,204 feet, but struck salt water at a depth of 1,729 feet, and to case this off reduced the hole to admit of casing four and one-quarter inch size. Plaintiff claimed a substantial performance on the ground that the well was for testing the territory, and that for this purpose a four and one-quarter inch hole was as good as a five and five-eighths inch, and that it would have been a useless expense to ream it out to the latter diameter when the experiment proved that the territory did not produce gas.

MR. JUSTICE STERRETT: Plaintiff company neither proved nor offered to prove such facts as would have warranted the jury in finding substantial performance of the contract embodied in the written proposition submitted to and accepted by the defendants. In several particulars the work contracted for was not done according to the plain terms of the contract. Nearly one-half of the well was not

reamed out, as required, to an eighth-inch diameter, so as to admit five and five-eighths inch casing in the clear. About 180 feet of the lower section of the well also was bored four or four and one-quarter inches, instead of five and five-eighths inches in diameter. In neither of these particulars, nor in any other respect, was there any serious difficulty in the way of completing the work in strict accordance with the terms of the agreement. To have done so would have involved nothing more than additional time and increased expense. The fact was patent, as well as proved by undisputed evidence, that a four and one-quarter inch well would not discharge as much gas as one five and five-eighths inches in diameter. It is no answer to say that for the purpose of testing the territory a four and one-quarter inch well was as good as a five and five-eighths inch well, nor that reaming out the well to the width and depth required by the contract would have subjected defendants to additional expense without any corresponding benefit. That was their own affair. They contracted for the boring of a well of specified depth, dimensions, etc., and they had a right to insist on at least a substantial performance of the contract according to its terms. That was not done, and the Court was clearly right in refusing to submit the case to the jury on evidence that would not have warranted them in finding substantial performance of the contract.

The equitable doctrine of substantial performance is intended for the protection and relief of those who have faithfully and honestly endeavored to perform their contracts in all material and substantial particulars, so that their right to compensation may not be forfeited by reason of mere technical, inadvertent or unimportant omissions or defects. It is incumbent on him who invokes its protection to present a case in which there has been no wilful omission or departure from the terms of his contract. If he fails to do so, the question of substantial performance should not be submitted to the jury. There is nothing in the record that requires a reversal of the judgment.

Judgment affirmed.

Discharge by performance

SINGERLY *v.* THAYER

108 Pa. 291 (1885).

Chief Justice Mercer delivered the opinion of the court.

This contention arises on a contract contained in the following written proposal, to wit:

"15th and Market Streets, Philadelphia, Pa. 8/16/1881.
"William M. Singerly, Esq.

"I propose to put my patent hydraulic hoist in your new building on Chestnut street (including a duplex pump worth $800) according to verbal specifications given by your architect for $2300 warranted satisfactory in every respect.

"Yours,
"ELI THAYER."

Singerly accepted this proposition. The elevator was substantially finished. It proved to be unsatisfactory. He therefore declined to accept it, and gave notice that he desired it to be removed. This Thayer refused to do. Thereupon Singerly took it down, and holds it subject to the order of Thayer. The latter brought this suit, claiming the contract price.

The controlling question is what meaning and effect are to be given to the words "warranted satisfactory in every respect"?

Satisfactory to whom? Certainly not to the maker only. Was it to be satisfactory to the person for whom it was to be made and by whom it was to be used? The learned judge thought this was not a necessary requirement, but if it was built in a workmanlike manner and performed its intended purpose in a manner which ought to be satisfactory to Singerly (the defendant below), that was sufficient. In other words, it may have been wholly unsatisfactory to him, yet if the jury thought he ought to have been satisfied he was bound to accept it. In effect that is, it need not have operated to his satisfaction in any respect, but to the satisfaction of the jury which might be called to pass on the rights of the parties.

The proposition was made to induce to purchase a kind of elevator not in general use. The fair inference is

that he desired to procure one that would be satisfactory to himself. The manifest import and meaning of the language used is that it should be satisfactory to him. This, then, was the agreement. To him alone was the proposition made. It would not have been any clearer had it read "warranted satisfactory to you in every respect." He therefore was the person to decide and to declare whether it was satisfactory. He did not agree to accept what might be satisfactory to others, but what was satisfactory to himself. This was a fact which the contract gave him the right to decide. He was the person negotiating for its purchase. He was the person who was to test it and use it. No other person could intelligently determine whether in every respect he was satisfied therewith.

McCaren *v.* McNulty, 7 Gray 139, was on an agreement to make a bookcase "in a good, strong and workmanlike manner to the satisfaction of the president of the society" for which it was to be made. It was held not to be sufficient to prove that it was constructed according to the terms of the agreement without also proving that it was satisfactory to or accepted by the defendant.

When the agreement is to make and furnish an article to the satisfaction of the person for whom it is to be made, numerous authorities declare it is not a compliance with the contract to prove he ought to have been satisfied. It was so held in Gray *v.* R. R., 11 Hun. 70, where the contract was for the purchase of a steamboat. In Brown *v.* Foster, 113 Mass. 136, when the agreement was to make a suit of clothes; in Zaleski *v.* Clark, 14 Conn. 218, on a contract for a plaster bust of the deceased husband of the defendant; in Gibson *v.* Cranage, 39 Mich. 49, where a portrait was to be satisfactory to the defendant; and in Hoffman *v.* Galleher, 6 Daly 42, where a portrait of defendant was to be satisfactory to his friends. So where a person got a set of teeth from a dentist under an agreement that they were to be satisfactory it was held that he was made the exclusive judge of their value.

To justify a refusal to accept the elevator on the ground that it is not satisfactory, the objection should be made in good faith. It must not be merely capricious. It is declared in 1 Parsons on Contracts 542, if A agrees to make something for B, to meet the approval of B, or with any similar language, B may reject it, for any objection which is made in good faith and is not merely capricious. The case of Andrews *v.* Belfield, 2 C. B. N. S. 779, arose on a written agreement to build a carriage in a manner which should meet the approval of the person for whom it was to be made, not only the score of workmanship, but also that of convenience and taste. It was held that his rejection made in good faith was conclusive.

It may have been very unwise in the maker of this elevator to agree to expend labor and furnish materials and rely for payment on the uncertain approval of one so largely interested in determining whether it was satisfactory to himself. Having entered into a contract whereby he did run this risk, his legal rights are to be determined thereby. In Nelson *v.* Von Bonnhorst, 5 Casey 352, one gave a written instrument under seal admitting an indebtedness to another in a specified sum, which he agreed to pay "whenever in my opinion my circumstances will enable me to do so." It was held that the instrument imposed no legal obligation which could be enforced by action, as the maker was the sole judge of his ability. In that case there was an unquestioned indebtedness to be discharged by the payment of money. Every other person might swear the circumstances of the debtor made him abundantly able to pay, yet that did not determine his legal liability.

Judgment reversed, and a *venire facias de novo* awarded.

Editor's Note.—In an action upon a contract which provides that if there shall be any difficulty as to the work giving satisfaction, the contractor is to make it entirely satisfactory, he is entitled to a reasonable time to make it satisfactory, and if the evidence is conflicting as to the extent of the delay, and as to whether he is given an opportunity to make it satisfactory, the case is for the jury and the verdict and judgment in favor of the contract will be affirmed. Schlicter *v.* Ins. Co., 191 Pa. 477.

Discharge by performance

ERIKSON *v.* WARD,

266 Ill. Repts. 259 (1914).

Writ of error to the Appellate Court for the First District.

MR. JUSTICE FARMER delivered the opinion of the court. Plaintiff's right of action was based upon a certain building contract entered into by the respective parties July 9, 1907. The contract provided that plaintiff was to furnish the labor and material and construct the building for $4,800. It was to be completed on or before November 1, 1907, and was to be constructed according to plans and specifications made by Architect Walter, in a good, workmanlike and substantial manner, "to the satisfaction" of defendant, under the direction of the architect, the consideration to be paid in sums in proportion to the progress of the work. On the first day of August defendant paid, in accordance with the architect's certificate, $600. On the fifth of August he discharged the architect, and did not employ any other architect or superintendent, but thereafter superintended the building himself. August 15 he paid plaintiff $1,400 on the contract, and October 17, $500, making a total paid on the contract of $2,500. He thereafter refused to make further payments, for the reason he claimed the work had not been done in accordance with the contract, plans and specifications.

It is insisted the court erroneously construed the provision of the contract that the work was to be done according to the drawings and specifications, to the satisfaction of the defendant, under the direction of the architect, and erroneously instructed the jury as to the rights of the parties under the terms of the agreement.

Whether plaintiff honestly and in good faith performed the contract was an issue of fact made by the pleadings and submitted to the jury. (Shepard *v.* Mills, 173 Ill. 223.) Plaintiff offered proof tending to show that, except for the

changes directed and approved by defendant, he did perform the contract in all its material and substantial particulars. Defendant offered proof to the contrary. Notwithstanding the facts are not open to review by us, they have been elaborately argued by both parties. Defendant contends the proof shows plaintiff did not substantially perform the contract, and that the law is when a builder neglects to perform or intentionally omits the performance of substantial work required by the contract there can be no recovery. By the instructions given on behalf of plaintiff the Court told the jury that literal compliance with the plans and specifications was not necessary to a recovery; that if the evidence showed plaintiff had in good faith performed the contract substantially and in all material respects according to the plans and specifications, without wilful departure therefrom or omission in essential points, he was entitled to recover the contract price, less the reasonable cost shown by the evidence of putting the premises in the condition they would have been in if the work had been performed according to the plans, specifications and ordinances. The Court also instructed the jury that the provision of the contract that the work was to be done to the satisfaction of defendant meant satisfaction to be reasonably and not arbitrarily exercised; that upon that question the testimony of defendant that the work was not done to his satisfaction was not alone to be considered, but that all the evidence should be considered in determining whether defendant in good faith, honestly and reasonably, was not satisfied with the work. As to changes in the plans and specifications, the Court instructed the jury defendant had a right to make changes, and if he did order changes, and they were made as requested, such changes should not be considered as a failure to perform the contract. An issue of fact was made as to whether certain changes in the plans and specifications, admitted by plaintiff to have been made, were assented to by defendant, and whether the contract otherwise was per-

formed according to its terms. These were questions for the jury to determine. Shepard *v.* Mills, *supra.*

This Court has adopted the rule, sustained by the weight, though not by all of the authorities, that where there has been no wilful departure from a building contract in essential points, but the contractor has honestly performed the contract in all its substantial and material particulars, he will not be held to have forfeited his right to recover by reason of technical, inadvertent or unimportant omissions. (Peterson *v.* Pusey, 237 Ill. 204.) We must assume the jury found plaintiff had performed the contract substantially and in all its material particulars, otherwise the verdict would not have been for the plaintiff, and that in assessing the amount due plaintiff allowance was made for any damages resulting from a departure from the contract in unimportant particulars, as the verdict was for a less sum than the balance due by the terms of the agreement. The question then arises, what is the proper legal construction of the language in the contract that the work was to be done to the satisfaction of the defendant? We cannot agree that this language in the contract authorized the defendant arbitrarily to defeat payment solely on the ground that the contract had not been performed to his satisfaction. The contract bound the contractor to furnish the materials and do the work in accordance with plans and specifications prepared by defendant's architect, and under the direction of said architect. It was not a simple agreement to construct a building that would be satisfactory to defendant. If it was in good faith constructed of material and in the manner specified in the plans and specifications prepared by the defendant's architect, defendant could not refuse payment merely because he was dissatisfied. We have held that where a building contract provides the work done or the material used shall be subject to the approval of the architect before payment is to be made, a capricious and unreasonable refusal of the architect to approve the work or material will not defeat payment. In such cases the architect has not the

right to arbitrarily withhold his approval if, acting reasonably and in good faith, he ought to have been satisfied with the work or material and have approved the same. (Badger *v.* Kerber, 61 Ill. 328.) It has been held that where one contracts to furnish another personal property, personal services or works of art that will give satisfaction, if the property or the services furnished are not satisfactory there can be no recovery. (Kendall *v.* West, 196 Ill. 221.) The same strictness has not usually been applied to contracts for the construction of buildings. (4 Elliott on Contracts, sec. 3,710.) In Hawkins *v.* Graham, 149 Mass. 284 (21 N. E. Rep. 312), the Court construed a contract to furnish defendant a hearing apparatus that would prove satisfactory to him and conform to all the requirements of the contract. The Court said the only question to be determined was whether the right of plaintiff to recover depended upon the actual satisfaction of defendant with the work and material furnished by plaintiff. After referring to the modern modes of business and the anxiety to make contracts inducing the placing of such provisions in a contract, the Court said: "Still, when the consideration furnished is of such a nature that its value will be lost to the plaintiff, either wholly or in great part, unless paid for, a just hesitation must be felt and clear language required before deciding that payment is left to the will, or even to the idiosyncrasies, of the interested party. In doubtful cases courts have been inclined to construe agreements of this class as agreements to do the thing in such a way as reasonably ought to satisfy the defendant. (Sloan *v.* Hayden, 110 Mass. 141.) In Handy *v.* Bliss, 204 Mass. 513 (90 N. E. Rep. 864), a building contract was before the court which required the work to be performed to the satisfaction of the owner. The Court said: "There is no reason why the doctrine of substantial performance should not apply where the contract is to be performed to the satisfaction of the owner, according to the usual meaning of this expression as applied to contracts of this kind, namely, to his satisfaction, so far as he is acting

reasonably in considering the work in connection with the contract." After stating there is more reason for the strict construction of such contracts where the subject matter of the contract involves questions of personal taste or prejudice and no benefit would pass under it unless the work was accepted, the Court said: "The erection of a building upon real estate ordinarily confers a benefit upon the owner, and he should not be permitted to escape payment for it on account of a personal idiosyncrasy. Indeed, under the law of Massachusetts this question is usually of little practical application to contracts for buildings upon real estate, for if the contract is not performed by reason of the failure of the owner to be satisfied with that which ought to satisfy him, there can be a recovery upon a *quantum meruit.*"

A careful investigation of this record fails to disclose to us any meritorious ground for reversing the judgment, and it is affirmed.

Judgment affirmed.

CHAPTER XII

DISCHARGE BY IMPOSSIBILITY

Destruction of subject matter

DEXTER *v.* NORTON ET AL.,

47 N. Y. 62 (1871).

Appeal from a judgment entered upon an order of the General Term of the Supreme Court in the first judicial district, overruling plaintiff's exceptions, and directing judgment dismissing the complaint, in accordance with ruling of the court at circuit.

This action is brought to recover damages for a breach of a contract to sell and deliver cotton. Defendants, on the 5th day of October, 1865, at the City of New York, agreed to sell and deliver to the plaintiff 607 bales of cotton, bearing certain marks and numbers, specified in the contract, at the price of forty-nine cents per pound, and fourteen bales, bearing marks and numbers, specified in the written contract, at the price of forty-three cents per pound, the cotton to be paid for on delivery. Defendants delivered to the plaintiff 460 bales of the said cotton, the remaining 161 bales were accidentally destroyed by fire without fault or negligence of the defendants. Cotton rose in value after the sale, and plaintiff claimed to recover the increase on the 161 bales. The Court dismissed the complaint, upon the ground that a fulfillment of the contract by the sellers had become impossible by the destruction, without their fault, of the subject matter of the sale, and they were, therefore, excused from the obligation to perform their agreement.

Plaintiff excepted.

CHURCH, C. J.: The contract was for the sale and delivery of specific articles of personal property. Each

bale sold was designated by a particular mark, and there is nothing in the case to show that these marks were used merely to distinguish the general kind or quality of the article, but they seem to have been used to describe the particular bales of cotton then in possession of the defendant. Nor does it appear that there were other bales of cotton in the market of the same kind, and marked in the same way. The plaintiff would not have been obliged to accept any other cotton than the bales specified in the bought note.

The contract was executory, and various things remained to be done to the 161 bales in question by the sellers before delivery. The title, therefore, did not pass to the vendee, but remained in the vendor. Joyce *v.* Adams, 8 N. Y. 291.

This action was brought by the purchaser against the vendor to recover damages for the non-delivery of the cotton, and the important and only question in the case is whether upon an agreement for the sale and delivery of specific articles of personal property, under circumstances where the title to the property does not vest in the vendee, and the property is destroyed by an accidental fire before delivery without the fault of the seller, the latter is liable upon the contract for damages sustained by the purchaser.

The general rule on this subject is well established, that where the performance of a duty or charge created by law is prevented by inevitable accident without the fault of the party he will be excused, but where a person absolutely contracts to do a certain thing not impossible or unlawful at the time, he will not be excused from the obligations of the contract unless the performance is made unlawful or is prevented by the other party.

Neither inevitable accident nor even those events denominated acts of God will excuse him, and the reason given is that he might have provided against them by his contract. Paradine *v.* Jane, Aleyn, 27.

But there are a variety of cases where the courts have implied a condition in the contract itself, the effect of which was to relieve the party when the performance had, without his fault, become impossible; and the apparent confusion in the authorities has grown out of the difficulty in determining in a given case whether the implication of a condition should be applied or not, and also in some cases in placing the decision upon a wrong basis. The relief afforded to the party in the cases referred to is not based upon exceptions to the general rule, but upon the construction of the contract.

For instance, in the case of an absolute promise to marry, the death of either party discharges the contract, because it is inferred or presumed that the contract was made upon the condition that both parties should live.

So of a contract made by a painter to paint a picture, or an author to compose a work, or an apprentice to serve his master a specified number of years, or in any contract for personal services dependent upon the life of the individual making it, the contract is discharged upon the death of the party, in accordance with the condition of continued existence, raised by implication. 2 Smith's Leading Cases, 50.

The same rule has been laid down as to property; "As if A. agrees to sell and deliver his horse Eclipse to B. on a fixed future day, and the horse die in the interval the obligation is at an end." Benjamin on Sales, 424. In replevin for a horse, and judgment of *retorno habendo,* the death of the horse was held a good plea in an action upon the bond. 12 Wend, 589. In Tylor *v.* Caldwell (113 E. C. L. R. 824) A. agreed with B. to give him the use of a music hall on specified days, for the purpose of holding concerts, and before the time arrived the building was accidentally burned; held, that both parties were discharged from the contract. Blackburn, J., at the close of his opinion, lays down the rule as follows: "The principle seems to us to be that in contracts in which the performance de-

pends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance, arising from the perishing of the person or thing, shall excuse the performance." And the reason given for the rule is, "because, from the nature of the contract, it is apparent that the parties contracted on the basis of the continued existence of the particular person or thing."

In School District No. 1 *v.* Dauchy (25 Conn. 530) the defendant had agreed to build a schoolhouse by the first of May, and had it nearly completed on the twenty-seventh of April, when it was struck by lightning and burned; and it was held that he was liable in damages for the non-performance of the contract. But the Court, while enforcing that general rule in a case of evident hardship, recognizes the rule of an implied condition in case of the destruction of the specific subject matter of the contract; and this is the rule of the civil law. Pothier on Contracts and Sale, Art. 4, 1, p. 31.

The circumstances of this case are favorable to the plaintiff. The property was merchandise sold in the market. The defendant could, and from the usual course of business, we may infer, did protect himself by insurance; but in establishing rules of liability in commercial transactions it is far more important that they should be uniform and certain that it is to work out equity in a given case. There is no hardship in placing the parties (especially the buyer) in the position they were in before the contract was made. The buyer can only lose the profits of the purchase; the seller may lose the whole contract price, and if his liability for non-delivery should be established, the enhanced value of the property. After considerable reflection, I am of the opinion that the rule here indicated of an implied condition in case of the destruction of the property bargained, without fault of the party, will operate to carry out the intention of the parties under most circumstances, and will be more just than the contrary rule. The buyer can of course always protect himself against the effect of

the implied condition, by a provision in the contract that the property shall be at the risk of the seller.

Upon the grounds upon which this rule is based of an implied condition, it can make no difference whether the property was destroyed by an inevitable accident, or by an act of God, the condition being that the property shall continue to exist. If we were creating an exception to the general rule of liability, there would be force in the considerations urged upon the argument, to limit the exception to cases where the property was destroyed by the act of God, upon grounds of public policy, but they are not material in adopting a rule for the construction of the contract so as to imply a condition that the property was to continue in existence. It can make no difference how it was destroyed, so long as the party was not in any degree in fault. The minds of the parties are presumed to have contemplated the possible destruction of the property, and not the manner of its destruction; and the supposed temptation and facility of the seller to destroy the property himself, cannot legitimately operate to affect the principle involved.

Judgment affirmed.

When contract is not discharged by impossibility

BERG *v.* ERICKSON,

234 Fed. 817 (1916).

Action by J. C. Berg against John Erickson. Judgment for defendant, and plaintiff brings error. Suit in equity by John Erickson against J. C. Berg. From a decree for complaint, respondent appeals. Reversed, and remanded for new trial.

SANBORN, Circuit Judge. John Erickson, a resident of Kansas, made a written contract with J. C. Berg, a resident of St. Francis, Texas, on April 16, 1913, to pasture

for him 1,000 steers and to "furnish plenty of good grass, water and salt during the grazing season of 1913" to them for $7 per head, which Berg agreed to pay. Erickson furnished the grass, water and salt to them during May and June, but the most severe drought which had been known in that part of Kansas subsequently prevailed, and on account of that drought it was impossible for Erickson to furnish, and he failed to furnish, plenty of good grass for the cattle during July, August and September, to the damage of Berg in the sum of about $20,000; and the main question in this case is whether Erickson is liable to pay these damages to Berg on account of his breach of his contract, or is absolved from liability for them by the impossibility of performance which resulted from the drought after the contract was made. The question was presented in this way: At the end of the grazing season Erickson claimed an agister's lien on the cattle for the agreed price of the pasturing, $7 per head, and refused to deliver them until that price was paid. Thereupon Berg replevied the cattle upon a complaint in which he alleged his ownership and right to the possession of them, and that by the failure of Erickson to furnish the agreed grass the cattle were worth $33,000 less than they would have been if Erickson had performed his contract. Erickson denied liability for the damage to the cattle, on the ground that it was caused by the drought, an act of God, and pleaded his agister's lien and his right to the possession of the cattle thereunder. He also brought a suit in equity against Berg, in which he set forth and prayed the adjudication of his agister's lien for the $7 a head, and asked further relief. Berg, in his answer to this complaint, denied the existence of any agister's lien, alleged Erickson's breach of his contract and his damage in the sum of $33,000, pleaded a counterclaim for these damages, and asked a judgment for their recovery.

The action in replevin and the suit in equity were tried together by the court below without a jury by consent of the parties. The court decided that Erickson had an agister's

lien upon the cattle for the value of the grass furnished in the months of May and June, and for certain expenses which he incurred and the value of certain services which he rendered in caring for the cattle when they were ill, and in feeding them at the end of the grazing season, to the amount of $2,999.41, and rendered a judgment in the action in replevin for the return to him of the cattle, or for the payment to him of that amount. The court also held that Erickson was absolved from liability for his breach of his contract to furnish plenty of good grass by the unusual drought, and it rendered a decree in the suit of equity that Berg was indebted to Erickson in the sum of $2,999.41, that Erickson should have judgment for this amount in his action in replevin, and that Berg should take nothing on account of the damages he sustained by reason of Erickson's breach of his contract. Berg challenges the judgment by writ of error, and the decree by an appeal.

Erickson agreed to furnish plenty of good grass to the cattle throughout the grazing season of 1913. He failed to perform this contract, to the damage of Berg in the sum of $20,000, because the unprecedented drought made it impossible for him so to do. Did this impossibility of performance, which arose subsequent to the making of the contract, out of the unusual drought, the act of God, relieve Erickson from liability for the damages inflicted upon Berg by his failure to perform his contract?

An examination of the authorities and reflection have satisfied us that the answer to this question must be deduced from a correct construction of the agreement of these parties under the following principles of law, which, notwithstanding the fact that there are confusing and conflicting decisions on cognate questions in the books, are established by the more convincing reasons and the greater weight of authority:

Where an obligation or a duty is imposed on a person by law, he will be absolved from liability for non-performance of the obligation if his performance is rendered im-

possible without his fault, by an act of God or an unavoidable accident. But this rule is not generally applicable to contract obligations.

Whether or not one, who by contract imposes upon himself an obligation or duty, is absolved from liability for his non-performance by a subsequent impossibility of performance caused, without his fault, by an act of God or an unavoidable accident, depends upon the true construction of his contract. The general rule is that one, who makes a positive agreement to do a lawful act, is not absolved from liability for a failure to fulfill his covenant by a subsequent impossibility of performance caused by an act of God, or an unavoidable accident, because he voluntarily contracts to perform it without any reservation or exception, which, if he desired, he could make in his agreement, thereby induces the other contracting party in consideration of his positive covenant to enter into and become bound by the contract, and while courts may enforce, they may not avoid, such contracts in the absence of fraud or some similar defense. 9 Cyc. 627, par. 5.

But where it clearly appears from the situation of the parties at the time they made their contract and from its terms, that they must have known that its performance would be impossible unless a person or persons, as in a contract of intermarriage, or in a contract for the personal service of an artist, such as a singer, should be living at the time for the performance of the contract, and there is no express or implied warranty of his life, a condition is implied that the contractor shall be absolved from liability in performance becomes impossible without his fault, by the death of the indispensable person. A like condition is implied in a contract for the delivery of a specific animal under like condition.

There are authorities to the effect that, where it clearly appears from the situation of the parties and their contract that they must have known when they made it that its performance would be impossible unless a thing,

or a condition of things, then in existence should exist at the time of performance, or unless an indispensable thing or conditon of things not then in existence should come into existence before and remain in existence at the time of performance, there also, in the absence of an expressed or implied warranty of the existence of the indispensable thing or condition at the time of performance, there arises an implied condition of the contract that, if that thing or condition is destroyed or prevented from coming into existence before the time for the performance of the contract without fault of the obligor, either by the act of God, or by an unavoidable accident, the obligor shall be absolved from liability for his failure to perform. 9 Cyc. 631, 632, 633. But no decision of the Supreme Court or of any federal court to this effect has been cited or discovered which goes so far, and the rule adopted by the Supreme Court, which must prevail here, is otherwise.

It is that, although general words, which cannot be reasonably supposed to have been used with reference to the possibility of an event, may not be held to bind one, yet, where one, at the time of making his contract, must have known or could have reasonably anticipated, and in his contract could have guarded against, the possible happening of the event causing the impossibility of his performance, and nevertheless he makes an unqualified undertaking to perform, he must do so or pay the damages for his failure. * * *

In Northern Pacific Ry. Co. *v.* American Trading Co., 195 U. S. 439, the railway company, during the Chinese-Japanese War, made a contract with a shipper to carry from Newark, N. J., to Japan by a specific steamer leaving Tacoma at a certain day, 2,000 tons of lead, which was contraband of war. Time was of the essence of this contract. The company carried the lead to Tacoma, and put it in the steamship in time, but the subcollector of the port unlawfully refused to give the ship its clearance on the ground that the lead was contraband, and the master unloaded it,

took his clearance and sailed. The result was that the lead did not reach Japan until six weeks after it would have arrived there if it had gone on the specified ship. When it arrived, the war had ceased and the price of lead had fallen. The shipper sued for damages, and the defense was that the railway company was absolved from liability by the unforeseen impossibility of performance caused without its fault by the act of the subcollector. The Supreme Court construed the contract to have been an unqualified undertaking to ship the lead by the steamship named, and held the railway company liable for the damages which resulted from the unauthorized and unforeseen act of the subcollector. It said:

"This contract, in view of all the facts, we think was made in contemplation of trouble arising from the character of the lead as contraband of war. * * * Under these circumstances it ought not to be held that the mistaken action of the deputy collector in refusing to give the clearance should operate as an excuse for the non-performance of the contract, which was not hereby rendered illegal. It cannot be affirmed that such possible refusal was not within the contemplation of the contracting parties when the contract was made. Many causes, it was known, might operate to obstruct the transportation of articles contraband of war. This particular form of impediment may not have been actually within the minds of the parties to the contract; but there was, as the agreed facts show, present to their minds the fact that there might be trouble in procuring the transportation of the lead because of its character as contraband of war, and in the light of those facts the contract was made, and in substance ratified after it was made. The railroad receivers took the risk of this, as of other obstructions, in making the contract, and they ought to be held to it."

In the light of these principles of law and authorities, the decisive question in this case becomes: Was the contract of these parties an absolute agreement by Erickson to furnish plenty of good grass to the cattle during the grazing

season of 1913, or a contract to furnish good grass unless by an unprecedented drought it should become impossible for him to do so? Basic rules for the construction of contracts are: The purpose of every agreement is to record the intention of the parties when their minds met, and the object of all construction is to ascertain and enforce that intention. The court should, so far as possible, put itself in the place of the parties when their minds met upon the terms of the agreement, and then, from a consideration of the writing itself, of its purpose, and of the circumstances which condition its making, endeavor to ascertain what they intended to agree to do, upon what sense and meaning of the terms they used their minds actually met. Accumulator Co. *v.* Dubuque St. Ry. Co., 12 C. C. A. 37. Where in the application of a contract to its subject-matter, an ambiguity or uncertainty arises, which cannot be removed by an examination of the agreement alone, parol evidence of the circumstances under which it was made, and of statements made in the negotiations which preceded it, may be admitted to resolve the ambiguity and to prove the real intentions of the parties. Kilby Mfg. Co. *v.* Hinchman-Renton Fire Proofing Co., 132 Fed. 957, 961.

Let us apply these rules to the interpretation of this contract. On its face it is free from ambiguity. By it Erickson agrees, without exception or qualification, to furnish plenty of good grass for the cattle during the grazing season of 1913. His counsel argue that his real agreement was that he would furnish plenty of good grass during the season unless an unprecedented drought should make it impossible for him so to do, and that in that case he should be absolved from liability to perform, and they appeal to the oral testimony to import this exception into the contract. That testimony disclosed these facts: The contract was made on April 16, 1913. Berg was a resident of St. Francis, Texas. He had never had any experience of Kansas grass. He sought pasturing for 1,000 cattle. He went from Texas to Kansas and applied to

Erickson for this pasturing. Before the contract was made Erickson showed him the pastures into which he proposed to put the cattle and into which they were subsequently driven. Berg looked at the pastures and made no objection to them. Erickson told him he would guarantee the pastures. After this inspection and conversation Erickson made the contract to furnish plenty of good grass to the cattle during the grazing season of 1913. Droughts are not and have not been for many years, unusual in parts of Kansas. There had been many before the drought of 1913. It is common knowledge that droughts decrease the production of grass in varying amounts according to their severity and the character of the land they affect. The drought of 1913 was the most severe ever known in the region where these pastures are. There was no rain from May until September, but it did not prevent the growth of all grass on the pastures. They produced sufficient to keep the cattle alive, and at the end of the season, when they were taken out in November, they weighed as much as, or even more than, when they were placed in the pastures; but the cattle failed to make the gain in flesh and weight which they would have made if Erickson had furnished them plenty of good grass.

In view of these facts, the situation of these parties when this contract was made, the circumstances surrounding them, and the unqualified undertaking of Erickson expressed in the agreement converge with compelling power to force the mind to the conclusion that the minds of these contracting parties met in the intention that Erickson should, and that he did, guarantee plenty of good grass for these cattle in these pastures where he put them during the entire grazing season, without exempting or intending to exempt himself from liability in the case of any impossibility of performance that might result from unprecedented drought, fire or other act of God or accident. It was common

knowledge that droughts were not unusual in Kansas. It was common knowledge that they decreased the growth of grass. It was common knowledge that one could not tell by the examination of pastures in Kansas, of which he had no previous knowledge, in the spring of the year before the 13th of April, whether or not they would produce sufficient grass for 1,000 cattle throughout the coming summer. Berg knew nothing of their productive capacity; Erickson knew all about it. The question of whether or not the pastures would produce plenty of grass for 1,000 head of cattle throughout the season, and whether or not the droughts that visited some parts of Kansas would be so severe as to prevent such production, could not have failed to be present in the minds of each of these parties when they made this contract. Those were the crucial questions before them, and the unprecedented drought which prevented the performance of the contract, "the event," in the words of the Supreme Court, "which causes the impossibility, might have been anticipated and guarded against in the contract." Erickson inserted no provision in the contract exempting himself from liability in the happening of that event, but, on the other hand, promised Berg that he would guarantee the pastures before the written contract was signed and then made the unqualified undertaking therein to furnish plenty of good grass to the cattle throughout the grazing season. What is more natural or probable than that Erickson, who knew the climate, the pastures, and their productivity, induced Berg, who knew nothing upon this subject and could learn little by an inspection of the pastures in April to agree to pay the $7 a head for the pasturing of the cattle by making this absolute covenant that he would furnish plenty of good grass to the cattle throughout the season? The proof in this case has satisfied that it was the intention of the parties to this contract that Erickson should thereby make, and that he did make, an absolute

covenant with Berg to furnish plenty of good grass for the cattle throughout the entire grazing season without exempting himself from liability in case of drought, fire, or other act of God or accident that might make his performance impossible, that he took the risk of such an event (195 U. S. 467, 25 Sup. Ct. 84, 49 L. Ed. 269), and that he is not absolved from liability for the damages which Berg sustained by reason of Erickson's failure to perform his covenant, although that failure was caused by the unprecedented drought which made his performance impossible. * * *

Judgment reversed. New trial ordered.

Chapter XIII

DISCHARGE BY OPERATION OF LAW

CLIFTON *v.* JACKSON IRON CO.,
74 Mich. 183 (1889).

CAMPBELL, J.: Plaintiff sued defendant for trespass in cutting his timber in the winter of 1885-6. The defense set up was that the timber, though on plaintiff's land, belonged to defendant. This claim was based on the fact that on September 22, 1877, a little more than eight years before the trespass, defendant made a contract to sell the land trespassed on to plaintiff, but with this reservation:

"Reserving to itself, its assigns and corporate successors the ownership of pine, butternut, hemlock, beech, maple, birch, ironwood or other timber suitable for sawing into lumber or for making into firewood or charcoal, now on said tract of land, and also the right to cut and remove any or all of said timber, at its option, at any time within ten years from and after the date of these presents."

There were some unimportant provisions, also, not now material. Plaintiff showed that on November 4, 1885, the defendant conveyed to him the land in question by full warranty deed, and with no exceptions or reservations whatever. The testimony of defendant's agent, who cut the land tended to prove that when the cutting was done the defendant's manager did not dispute plaintiff's title, but gave the agent to understand that it belonged to plaintiff, but that some arrangement would be made about it; that plaintiff was then absent, and there was no conversation with him or his wife on the subject. The bill of exceptions certifies that no other evidence was given concerning the right to cut timber. Upon these facts the Court held that the deed conveyed the right in the timber to plaintiff, and that he owned it.

Had no deed been made, it is agreed that the reservation would have prevailed. But a previous contract cannot contradict or control the operation of a deed. It was competent for defendant to relinquish any contract reservation, and a deed which grants and warrants without any reservation has that effect. We do not hold that if the deed were so made by some mistake within the cognizance of equity the mistake might not be corrected. Neither need we consider whether, after such a deed, there might not be such dealings as to render such timber-cutting lawful, by license, expressed or implied. In this case there was no testimony tending to show that the deed was not supposed and intended to close up all the rights of the parties.

Judgment affirmed.

Editor's Note.—Where deeds are executed and accepted in performance of executory contracts to convey, the latter become *functus officio,* and thenceforth the rights of the parties are to be determined by the deeds, and not by the contracts, the presumption being that the deeds give expression to the final purposes of the parties; and the deeds will be conclusive unless it be shown that the grantees have been led by fraud or mistake of fact to accept something different from what the executory contracts called for, in which cases the courts will give relief. Griswold et al. *v.* Eastman et al., 51 Minn. 189.

Chapter XIV

DISCHARGE BY BREACH

Transfer in violation of contract obligation

WOLF *v.* MARSH,
54 Cal. 228 (1880).

Action on an instrument in writing. Judgment for plaintiff. Defendant appeals.

The instrument was as follows:

"MARTINEZ, November 24, 1866.

"For value received, I promise to pay to S. Wolf, or order, four hudred and forty-nine dollars, with interest at one per cent. per month from date until paid, principal and interest payable in United States gold coin. This note is made with the express understanding that if the coal mines in the Marsh Ranch yield no profits to me, then this note is not to be paid, and the obligation herein expressed shall be null and void.

"C. P. MARSH."

On November 1, 1871, defendant conveyed his interest in the ranch to one Williams. Up to that date the mines had yielded defendant no profits.

SHARPSTEIN, J.: * * * Before the mines had yielded any profits to the defendant, he sold and conveyed his interest in them to a stranger. By so doing he voluntarily put it out of his power ever to realize any profits from the mines. However great the yield of profits from them might be after that, they could yield none to him. And the principle is elementary, that "if one voluntarily puts it out of his power to do what he has agreed, he breaks his contract, and is immediately liable to be sued therefor, without demand, even though the time specified for performance has not expired." Bishop on Cont. 690 (1426).

That this case is within that principle, we do not entertain a doubt. When the note was executed, the de-

fendant was a half owner of the mines, which were leased on such terms that the production of coal from them must have yielded him a profit. After making the note, he voluntarily committed an act which made it impossible for the contingency upon which the note would become due and payable ever to arise. When he did that, he violated his contract, and the note at once became due and payable; and as this action was commenced within four years after that, it follows that the judgment and order of the court appealed from must be affirmed.

Renunciation of contract

WINDMULLER ET AL. *v.* POPE ET AL.,

107 N. Y. 674 (1887).

This was an action to recover damages for alleged breach of contract to purchase a quantity of iron. Verdict for plaintiffs. Judgment affirmed at General Term.

In January, 1880, the parties entered into a contract for the sale by plaintiffs and purchase by defendants of "about twelve hundred tons old iron, Vignol rails, for shipment from Europe at sellers' option, by sail or steam vessels to New York, Philadelphia, or Baltimore, at any time from May 1 to July 15, 1880, at thirty-five dollars per ton * * * deliverable in vessels at either of the above ports on arrival." On or about June 12, 1880, defendants notified plaintiffs that they would not receive or pay for the iron, or any part of it, and advised that plaintiffs better stop at once in attempting to carry out the contract. Plaintiffs thereupon sold the iron abroad which they had purchased to carry out the contract.

PER CURIAM: We think no error is presented upon the record which requires a reversal of the judgment. The defendants having on the 12th of June, 1880, notified the

plaintiffs that they would not receive the iron rails or pay for them, and having informed them on the next day that if they brought the iron to New York they would do so at their own peril, and advised them that they had better stop at once attempting to carry out the contract, so as to make the loss as small as possible, the plaintiffs were justified in treating the contract as broken by the defendant at that time, and were entitled to bring the action immediately for the breach, without tendering the delivery of the iron, or awaiting the expiration of the period of performance fixed by the contract; nor could the defendants retract their renunciation of the contract after the plaintiffs had acted upon it, and by a sale of the iron to other parties changed their position. Dillon *v.* Anderson, 43 N. Y. 231; * * *

The ordinary rule of damages in an action by a vendor of goods and chattels, for a refusal by the vendee to accept and pay for them, is the difference between the contract price and the market value of the property at the time and place of delivery.

Judgment affirmed.

Chapter XV

DAMAGES FOR BREACH OF CONTRACT

Liquidated damages and penalties

KEMBLE *v.* FARREN,

6 Bingham 141 (1829).

TINDAL, C. J.: This is a rule which calls upon the defendant to show cause why the verdict, which has been entered for the plaintiff for £750, should not be increased to £1000.

The action was brought upon an agreement made between the plaintiff and the defendant, whereby the defendant agreed to act as a principal comedian at the Theatre Royal, Covent Garden, during the four then next seasons, commencing October, 1828, and also to conform in all things to the usual regulations of the said Theatre Royal, Covent Garden; and the plaintiff agreed to pay the defendant £3 6s. 8d. every night on which the theatre should be open for theatrical performances, during the next four seasons, and that the defendant should be allowed one benefit night during each season, on certain terms therein specified. And the agreement contained a clause, that if either of the parties should neglect or refuse to fulfill the said agreement, or any part thereof, or any stipulation therein contained, such party should pay to the other the sum of £1000, to which sum it was thereby agreed that the damages sustained by any such omission, neglect, or refusal, should amount; and which sum was thereby declared by the said parties to be liquidated and ascertained damages, and not a penalty or penal sum or in the nature thereof.

The breach alleged in the declaration was, that the defendant refused to act during the second season, for which

breach, the jury, upon the trial, assessed the damages at £750; which damages the plaintiff contends ought by the terms of the agreement to have been assessed at £1000.

It is, undoubtedly, difficult to suppose any words more precise or explicit than those used in the agreement; the same declaring not only affirmatively that the sum of £1000 should be taken as liquidated damages, but negatively also that it should not be considered as a penalty, or in the nature thereof. And if the clause had been limited to breaches which were of an uncertain nature and amount, we should have thought it would have had the effect of ascertaining the damages upon any such breach at £1000. For we see nothing illegal or unreasonable in the parties, by their mutual agreement, settling the amount of damages, uncertain in their nature, at any sum upon which they may agree. In many cases, such an agreement fixes that which is almost impossible to be accurately ascertained; and in all cases, it saves the expense and difficulty of bringing witnesses to that point. But in the present case, the clause is not so confined; it extends to the breach of any stipulation by either party. If, therefore, on the one hand, the plaintiff had neglected to make a single payment of £3 6s. 8d. per day, or on the other hand, the defendant had refused to conform to any usual regulation of the theatre, however minute or unimportant, it must have been contended that the clause in question in either case, would have given the stipulated damages of £1000. But that a very large sum should become immediately payable, in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms; the case being precisely that in which courts of equity have always relieved, and against which courts of law have, in modern times, endeavored to relieve, by directing juries to assess the real damages sustained by the breach of the agreement. It has been argued at the bar, that the liquidated damages apply to those breaches of the agreement, only which are in their nature uncertain, leaving those which

are certain to a distinct remedy, by the verdict of a jury. But we can only say, if such is the intention of the parties, they have not expressed it; but have made the clause relate, by express and positive terms, to all breaches of every kind. We cannot, therefore, distinguish this case, in principle, from that of Astley *v.* Weldon, in which it was stipulated, that either of the parties neglecting to perform the agreement should pay to the other of them the full sum of £200, to be recovered in His Majesty's courts at Westminster. Here there was a distinct agreement, that the sum stipulated should be liquidated and ascertained damages; there were clauses in the agreement, some sounding in uncertain damages, others relating to certain pecuniary payments; the action was brought for the breach of a clause of an uncertain nature; and yet it was held by the court, that for this very reason it would be absurd to construe the sum inserted in the agreement as liquidated damages, and it was held to be a penal sum only. As this case appears to us to be decided on a clear and intelligible principle, and to apply to that under consideration, we think it right to adhere to it, and this makes it unnecessary to consider the subsequent cases, which do not in any way break in upon it. The consequence is, we think the present verdict should stand, and the rule for increasing the damages be discharged.

Rule discharged.

Measure of damages

HADLEY AND ANOTHER *v.* BAXENDALE AND OTHERS,

9 Exchequer 341 (1854).

* * * At the trial before Crompton, J., at the last Gloucester Assizes, it appeared that the plaintiffs carried on

Editor's Note.—Above is a leading case and is followed generally in the American cases. See Bignall *v.* Gould, 119 U. S. 495.

an extensive business as millers at Gloucester, and that, on May 11th, their mill was stopped by a breakage of the crank-shaft by which the will was worked. The steam engine was manufactured by Messrs. Joyce & Co., the engineer, at Greenwich, and it became necessary to send the shaft as a pattern for a new one to Greenwich. The fracture was discovered on the 12th, and on the 13th the plaintiffs sent one of their servants to the office of the defendants, who are the well-known carriers trading under the name of Pickford & Company, for the purpose of having the shaft carried to Greenwich. The plaintiffs' servants told the clerk that the mill was stopped, and that the shaft must be sent immediately; and in answer to the inquiry when the shaft would be taken, the answer was, that if it was sent up by 12 o'clock any day, it would be delivered at Greenwich on the following day. On the following day the shaft was taken by the defendants, before noon, for the purpose of being conveyed to Greenwich, and the sum of £2 4s. was paid for its carriage for the whole distance; at the same time the defendants' clerk was told that a special entry, if required, should be made to hasten its delivery. The delivery of the shaft at Greenwich was delayed by some neglect; and the consequence was, that the plaintiffs did not receive the new shaft for several days after they would otherwise have done, and the working of their mill was thereby delayed, and they thereby lost the profits they would otherwise have received.

On the part of the defendants it was objected that these damages were too remote, and that the defendants were not liable with respect to them. The learned judge left the case generally to the jury, who found a verdict with £25 damages beyond the amount paid into court.

* * * The judgment of the court was now delivered by

ALDERSON, B.: We think that there ought to be a new trial in this case, but in so doing, we deem it to be expedient and necessary to state explicitly the rule which the judge, at the next trial ought, in our opinion, to direct the jury to be governed by when they estimate the damages.

It is, indeed, of the last importance that we should do this, for if the jury are left without any definite rule to guide them, it will, in such cases as these, manifestly lead to the greatest injustice. The courts have done this on several occasions; and in Blake *v.* Midland Railway Company, 21 L. J., Q. B. 237, the Court granted a new trial on this very ground, that the rule had not been definitely laid down to the jury by the learned judge at *nisi prius*.

"There are certain established rules," this Court says, in Alder *v.* Keighley, 15 M. & W. 117, "according to which the jury ought to find." And the Court, in that case, adds: "And here there is clear rule, that the amount which would have been received if the contract had been kept is the measure of damages if the contract is broken."

Now we think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be as much as may fairly and reasonably be considered either arising naturally—that is, according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances. from such a breach of

contract. For had the special circumstances been known the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them. Now the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract. It is said that other cases, such as breaches of contract in the non-payment of money, or in the not making a good title to land, are to be treated as exceptions from this, and as governed by a conventional rule. But as, in such cases, both parties must be supposed to be cognizant of that well-known rule, these cases may, we think, be more properly classed under the rule above enunciated as to cases under known special circumstances, because there both parties may reasonably be presumed to contemplate the estimation of the amount of damages according to the conventional rule. Now, in the present case, if we are to apply the principles above laid down, we find that the only circumstances here communicated by the plaintiffs to the defendants at the time the contract was made, were, that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of that mill. But how do these circumstances show reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person? Suppose the plaintiffs had another shaft in their possession put up or putting up at the time, and that they only wished to send back the broken shaft to the engineer who made it; it is clear that this would be quite consistent with the above circumstances, and yet the unreasonable delay in the delivery would have no effect upon the intermediate profits of the mill. Or again, suppose that, at the time of the delivery to the carrier, the machinery of the mill had been in other respects defective, then also the same results would follow. Here it is true that the shaft was actually sent back to serve as a model for a new one, and that the want of a new one was

the only cause of the stoppage of the mill, and that the loss of profits really arose from not sending down the new shaft in proper time, and that this arose from the delay in delivering the broken one to serve as a model. But it is obvious that, in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not, in all probability, have occurred and these special circumstances were here never commmunicated by the plaintiffs to the defendants. It follows, therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, perhaps would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants. The judge ought, therefore, to have told the jury that, upon the facts then before them, they ought not to take the loss of profits into consideration at all in estimating the damages. There must, therefore, be a new trial in this case.

Rule absolute.

Measure of damages

THEIS *v.* WEISS,

166 Pa. 9 (1895).

Appeal from a verdict for plaintiff. Assumpsit to recover damages, for failure to deliver flour under contract in writing. Contract is as follows: Pitts. Aug. 4, 1891.

Editor's Note.—Above is a leading case and is followed generally in the American cases.

Messrs. Theo. Weiss sold Peter Theis 100 cars of straight flour to be delivered on Peter Theis' order, cars to contain 200 barrels each, each car of flour to be equal to Theis and Kuegle and Co. flour, to be delivered two cars per day. Pay sight draft with bill of lading attached, price to be $4.00 per barrel bulk. Signed Theodore Weiss. Witness C. McMaster.

Opinion. The plaintiff testified on the trial positively and directly that he sold all the flour he bought from the defendant to various firm and individuals immediately after the contract in suit was made. He also said he was obliged to purchase the flour to fill these orders. He was permited to prove and did prove the low price of the flour during the time he was making the sales. He admitted, however, that he got most of the flour with which to fill these orders from his home field. The defendant asked the plaintiff what the flour he thus obtained cost him and whether he made or lost money on the flour he obtained to fill these orders. Court rejected these offers of proof; and the assignment of error to the rejection of the offers and to what the Court below said on the question of measure of damages give rise to the question, what is the true measure of damages applicable to the facts in the case. The Court charged that it was the difference between the contract price named in the contract in suit and the market price of the same grade of flour at the time and place of delivery. There is no doubt that this is the general rule in cases where the vendor of goods refuses to deliver and no part of the price has been paid. But the defendant contends that the rule is this; where the vendee supplies himself with other goods in order to fill orders which he has taken for the resale of the goods which he contracted to receive from the vendor.

In 2 Benj. on Sales, Sec. 1327, the writer says: "It is submitted that these decisions establish the following rules in cases where goods have been bought for the purpose of

resale and there is no market in which the buyer can readily obtain them:

"First, if at the time of the sale the existence of a sub-contract is made known to the seller the buyer on the sellers' default in delivering the goods has two courses open to him. He may elect to fulfill his sub-contract and the market would purchase the best substitute obtainable charging the seller with the difference between the contract price of the goods and the price of the goods substituted.

"Second, he may elect to abandon his sub-contract and in that case he may recover as damages against the seller his loss of profits on the sub-sale and any penalties he may be liable to pay for breach of sub-contract. * * *

"In every case the buyer, to entitle him to recover the full amount of damages, must have acted throughout as a reasonable man of business and done all in his power to mitigate the loss." "The value of the article at, or about the time is to be delivered for the measure of damages in a suit by the vendee against the vendor for a breach of the contract. * * *

"It is, therefore, proper to inquire into the true legal idea of damages in order to determine the proper definition of the term value. Except in those cases where oppression, fraud, malice or negligence enter into the question the declared object is to give compensation to the party injured for the actual loss sustained."

Kounts *v.* Kirkpatrick, 72 Pa. 376, and authorities there cited. The true rule said C. J. Gibson is to give actual compensation by graduating the amount of damages exactly to the extent of the loss.

Forsyth *v.* Palmer, 2 Harris 97. In Haskell *v.* Hunter 23 Mich. 305, it was held that in an action for the non-delivery of lumber the true measure of damages is the difference between the contract price and what it would have cost the plaintiff to protect it at the place of delivery and at the time or times when it was reasonably proper for them to supply themselves with the lumber of the kind and quality

they were to receive under the contract. We are therefore of the opinion that the defendant should have been allowed to prove what was the actual cost to the plaintiff of the flour which the plaintiff said he bought from other parties to fill his orders.

Judgment reversed and a new venire ordered.

Equitable relief from breach of contract

PHILADELPHIA BALL CLUB *v.* LAJOIE,
202 Pa. 210.

Bill in equity for an injunction.

POTTER, J.: The defendant in this case contracted to serve the plaintiff as a baseball player for a stipulated time. During that period he was not to play for any other club. He violated this agreement, however, during the term of his engagement and in disregard of his contract arranged to play for another and a rival organization. Plaintiff by means of this bill, sought to restrain him during the period covered by the contract. The Court below refused the injunctions, holding that to warrant the interference prayed for "the defendant's services must be unique, extraordinary and of such a character as to render it impossible to replace him; so that his breach of contract would result in irreparable loss to the plaintiff." In the view of the Court the defendant's qualifications did not measure up to this high standard. We think that in refusing relief unless the defendant's services were shown to be of such a character as to render it impossible to replace him the Court has taken extreme ground. It seems to us that a more just and equitable rule was laid down in Pomeroy on specific performance, p. 31, where the principle is thus declared: "Where one person claims to render personal services to another which require and presuppose a special knowledge, skill and

ability in the employee, so that in case of default the same service could not easily be obtained from others. Although the affirmative specific performance of the contract is beyond the power of the court its performance will be negatively enforced by enjoying the breach. * * *

The damages for breach to such a contract cannot be estimated with any certainty and the employer cannot by means of any damages breach the same service in the labor market. The Court below finds from the testimony that the defendant is an expert baseball player in any position; that he has a great reputation as second baseman; that his place would be hard to fill with as good a player, that his withdrawal from the team would weaken it as would the withdrawal of any good player, and would probably make a difference in the size of the audiences attending the game."

In addition to these features, which render his services of peculiar and special value to the plaintiff and not easily replaced, Lajoie is well known and has a great reputation among the patrons of this sport and ability in the position which he filled, and was thus a most attractive drawing card for the public. He may not be the sun in the baseball firmament, but he is certainly a bright star. We feel, therefore, that the evidence in this case justifies the conclusion that the services of defendant are of such unique character and display knowledge, skill and ability as renders them of peculiar value to the plaintiff and so difficult of substitution that their loss will produce irreparable injury in the legal significance of that term, to the plaintiff. The action of the defendant in violating this contract is a breach of good faith for which there would be no adequate redress at all, and the case therefore properly calls for the aid of equity in negatively enforcing the performance of the contract by enjoining against its breach. But the Court below was also of the opinion that the contract was lacking in mutuality of remedy and considered that as a controlling reason for the refusal of an injunction. In the contract now before us the defendant agrees to furnish skilled profes-

sional services to the plaintiff for a period which might extend over three years by proper notice given before the close of each current year. Upon the other hand, the plaintiff retains the right to terminate the contract upon ten days' notice and the payment for salary for that time and the expense of defendant in getting from his home. But the fact of this concession of the plaintiff is distinctly pointed out as part of the consideration for a large salary paid to the defendant and is emphasized as such. We are not persuaded that the terms of this contract manifest any lack of mutuality and remedy each party as a possibility of enforcing all the rights stipulated for in the agreement. We can agree that mutuality of remedy requires that each party should have precisely the same remedy either in form, effect or extent in a fair and reasonable contract in order to be sufficent; that each party has the possibility of compelling the performance of the promises which were mutually agreed upon. The defendant sold to plaintiff for a valuable consideration the exclusive right for the professional services for a stipulated period unless sooner surrendered by the plaintiff; which could only be after due and reasonable notice and payment of salary and expenses until the expiration. Why should not the Court of Equity protect such an agreement until it is terminated? The Court cannot compel the defendant to play for the plaintiff, but it can restrain him from playing for another club in violation of his agreement. No reason is given why this should not be done except that presented by the argument that the right given to plaintiff to terminate the contract upon ten days' notice destroys the mutuality of the remedy. Substantial justice between the parties require that the Court should restrain the defendant from playing for any other club during his term contract with the plaintiff.

Decree of the Court below reversed and bill reinstated.

Editor's Note.—Among the other remedies which may be obtained in courts of equity are decrees compelling the specific performance of contracts, and decrees compelling the reformation, recission, or cancellation of contracts. Briefly stated, the jurisdiction of courts of equity is to grant redress in cases where the ordinary remedy of an action for damages in a court of law would be inadequate.

Illustrations.—A. agreed to convey certain land to B. and then refused to do so. At law the only remedy would be an action for damages. In equity the promissor could be compelled to convey the land.

C. in conveying land to D. incorrectly described the land. D. could by bill in equity compel C. to execute a reformed deed, whereas at law he would only have an action for damages. See Bispham on Equity.

APPENDIX I

The outline which follows is reproduced by permission of the American Law Book Co. The parts of this outline on the subjects of "Conflict of Laws" and "Actions for Breach of Contract" have been omitted. Under the head of the "Parties," there has been inserted parts of the outlines on "Infants," "Insane Persons" and "Married Women" given under separate articles in "Cyc." The outline on "Infants" was written for "Cyc." by John Walker Macgrath, that on "Insane Persons" by Henry F. Buswell, and that on "Married Women" by William L. Burdick.

CONTRACTS

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(III) Offer of Act For Promise
(IV) Offer of Promise For Act
(V) Offer of Promise For Promise

c. Certainty of Offer
(I) In General
(II) No Uncertainty if Intention Can Be Ascertained

d. Terms of Offer
(I) In General
(II) Unexpressed Terms
(A) In General
(B) Usages and Customs of Trade
(III) Terms Not Appearing on Face of Offer

e. Communication of Offer
(I) In General
(II) Performance of Services and Other Acts Without Request or Knowledge
(III) Performance of Services and Other Acts Without Knowledge of Offer

3. Acceptance of Offer
a. Necessity For
b. Who May Accept
(I) Particular Offers
(II) General Offers

c. Forms of Acceptance
(I) Acceptance by Assent
(II) Acceptance by Promise
(III) Acceptance by Act
(IV) Acceptance by Silence
(V) Acceptance by Signing Paper Containing Offer
(VI) Acceptance by Accepting Paper Containing Terms
(A) In General
(B) Paper Not Purporting to Be a Contract
(C) Terms Not Readily Discernible
(D) Terms Unreasonable
(E) Where Case Is One of General Notice
(F) Notice Received After Agreement

d. Sufficiency of Acceptance
(I) Conditions Prescribed by Offer
(A) In General
(B) Conditions as to Time of Acceptance
(C) Conditions as to Place of Acceptance
(D) Conditions as to Mode of Acceptance
(II) Acceptance Conditionally or on Terms Varying From Offer
(III) Offerer's Acceptance of Conditional or Varying Acceptance
e. Communication of Acceptance
(I) In General
(II) Acceptance by Act
(III) Acceptance by Promise
(IV) Meaning of Communicated
4. Intention to Effect Legal Relations
a. In General
b. Social Engagements
c. Jokes or Jests
d. Statements of Intention and Promissory Expressions
e. Proposals to Deal
f. Advertisements of Goods For Sale
g. Invitations to Bid
h. Railroad and Steamship Time-Tables
i. Advertisement of Auction Sales
j. Advertisement of Theaters and Shows
k. Announcement of Examination For Scholarship
l. Negotiations Looking to Formal Contract
5. Revocation of Offer or Acceptance
a. Of Offer
(I) After Acceptance
(II) Before Acceptance
(III) Offer Giving Time For Acceptance
(IV) Consideration For Giving Time
(V) Offer Under Seal
(A) In General
(B) Options Under Seal
b. Revocation of Acceptance

IV. CONSIDERATION

A. Definition
B. Necessity For Consideration
   1. In General
   2. Contracts in Writing
   3. Contracts Under Seal
   4. Gratuitous Bailment.
   5. Statutory Obligations
C. Presumption of Consideration
   1. Negotiable Instruments
   2. Written Contracts Generally
D. What Constitutes a Consideration
   1. In General
   2. Illustrations of Sufficient Consideration
   3. Need Not Be Money or Money Value
   4. Benefit to Third Person
   5. What Is Not a Consideration
      a. In General
      b. Illustrations of No Consideration
      c. Promise to Make Gift
      d. Promise to Pay Money
      e. Promise to Pay Debt of Third Person
   6. Good and Valuable Consideration Distinguished
   7. Motive and Consideration Distinguished
   8. Marriage and Promise to Marry
   9. Executed and Executory Consideration
      a. In General
      b. Acceptance of Executed Consideration
      c. Consideration Executed Upon Request
   10. Mutual Promises
      a. In General
      b. Promises Must Be Concurrent
      c. Promise Must Impose Legal Liability
      d. Promise Must Be Certain
      e. Promise Must Be Legal
      f. Performance Must Be Possible
         (I) In General
         (II) Physical Impossibility
         (III) Legal Impossibility
      g. Promise May Be Conditional
      h. Mutuality
         (I) In General
         (II) Subscriptions
            (A) Mutual Promises
            (B) Implied Agreement to Perform
            (C) Actual Performance

(III) Mutuality May Be Implied
(IV) Executed Contracts
(V) Mutuality Subsequently Present
(VI) Options Founded on Consideration
(VII) Writings Signed by One Party Only

11. Waiver of Legal Right and Forbearance
    a. In General
    b. Illustrations of Waiver of Right or Forbearance
    c. Forbearance to Sue
        (I) In General
        (II) Different Views as to Existence of Right to Sue
            (A) View That Right Must Be Perfect
            (B) View That Right Must Be Reasonably Doubtful
            (C) Claims Clearly Unenforceable
            (D) View That Claim Must Be Bona Fide
    d. Right May Be Against Third Person
    e. Promise to Forbear and Actual Forbearance
    f. Mutual Promises to Forbear
    g. Time of Forbearance
    h. Compromise of Claims
    i. Abandonment or Discontinuance of Proceedings
    j. Discharge From Custody Under Writ
    k. Relinquishment of Defenses or Rights in Suit
12. Promise to Do or Doing What Promisor Is Bound to Do
    a. In General
    b. Subsisting Obligation in Law
    c. Subsisting Contractual Obligation
        (I) In General
        (II) Anomalous Views
            (A) Right Either to Perform or Pay Damages
            (B) Evidence of Mutual Rescission
            (C) Both Contracts in Force
            (D) Unforeseen Difficulties and Mistake
        (III) Exceptions
            (A) Matters Outside of Contract
            (B) Moral Obligation
            (C) Substituted Agreement

V. PARTIES

A. Two or More Parties Essential
B. Capacity to Contract
C. Parties Entitled to Enforce Contract
  1. In General
  2. Where False Representation Is Made
  3. Where Breach of Duty Is Connected with Contract
  4. Promise For the Benefit of Third Persons
    a. Doctrine That Third Person Cannot Sue
      (I) In General
      (II) Exceptions
        (A) Trust
        (B) Quasi Contract
        (C) Near Relationship
        (D) Agency
        (E) Novation
    b. Doctrine That Third Person Can Sue
      (I) In General
      (II) Limits to the Doctrine That Third Person May Sue
        (A) In General
        (B) Contract Under Seal
        (C) Contract Must Be Binding
        (D) Failure of Consideration and Rescission of Contract
D. Parties Against Whom Contracts May Be Enforced
  1. In General
  2. Assignees and Representatives
  3. Principals and Agents
  4. Ratification by Receipt of Benefits
  5. Contract May Impose Duty on Third Persons
E. Persons Not Having Full Contractual Ability
  1. Infants
    a. Who are Infants
      (I) Definition
      (II) Age of Majority
        (A) In General
        (B) When Age Deemed Attained
        (C) What Law Governs
    b. Privileges and Disabilities
      (I) Privileges
        (A) Immunity From Prejudice by Lapse of Time or Laches
        (B) Immunity From Estoppel

(II) Disabilities
- (A) In General
- (B) Appointment by Agent or Attorney
- (C) Acting as Agent
- (D) Acting as Trustee
- (E) Eligibility to Public Office or Employment
- (F) Acting as Common Informer
- (G) Exercising Right of Election
- (H) Admissions
- (I) Removal of Disabilities
  1. Emancipation by Act of Parent
  2. Emancipation by Marriage
  3. Judicial Emancipation

c. Contracts
- (I) Capacity to Contract
  - (A) In General
  - (B) Whether Contracts Void or Voidable
  - (C) Executed and Executory Contracts
  - (D) Contracts by Person Acting For Infant
  - (E) Contracts of Infant as Agent or Trustee
  - (F) Contracts Pursuant to Legal Obligation
  - (G) Contracts Pursuant to Statutory Authority
  - (H) Where Contract on Part of Adult Legally Compulsory
  - (I) Where Infant Engaged in Business
    1. In General
    2. Partnership
  - (J) Contracts Jointly With Adults
- (II) Particular Acts and Contracts Considered
  - (A) Accounts Stated
  - (B) Bills and Notes
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      4. Valid Contracts
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MARRIED WOMEN

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2. What Constitutes Fraud
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h. Recovery by Agent Against Principal
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4. Form of Illegal Agreement
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1. In General

2. Impossibility Known to Both Parties at Time of Contracting
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4. Impossibility at Time of Contracting Known to One Party Only
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1. In General
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1. In General
2. Modes of Discharge by Breach
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      (I) In General
      (II) Limitations to Rule
         (A) Renunciation Must Be Entire
         (B) Must Be Distinct and Unequivocal
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         (D) Renunciation May Be Rejected
         (E) Renouncing Party Cannot Force Acceptance
         (F) Other Party Cannot Proceed and Complete Contract
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5. Discharge by Failure to Perform
   a. In General
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APPENDIX II

GLOSSARY

Compiled from
Bouvier's Law Dictionary
By Wendell P. Raine

Action	Suit—The legal and formal demand of one's rights from another person or party made and insisted on in a court of justice.
Ad litem	For the suit; for the purpose of the suit; pending the suit.
Aggregatio mentium	The meeting of minds. The moment when a contract is complete.
Appellant	The party in a cause who takes the appeal.
Appellee	The party in a cause against whom an appeal has been taken.
Assumpsit	He undertook; he promised. A promise or engagement by which one person assumes or undertakes to do some act or pay something to another. It may be either oral or written.
Bill of Exceptions	A written statement of objections to the decisions of the court upon points of law, made by one of the parties.
Bill in Equity	A complaint in writing addressed to the Chancellor containing a statement of fact upon which the plaintiff relies and the allegations which he makes with an averment that the acts complained of are contrary to equity and containing a prayer for relief and the issuance of proper process.
Caveat emptor	Let the buyer take care. Purchaser of an article must examine, judge and test it for himself, being bound to discover any *obvious* defects or imperfections.
Certiorari	A writ issued by a superior to an inferior court requiring the latter to send in to the former some proceeding therein pending or the record and proceedings in some cause already terminated.

Chattel Mortgage	An instrument of sale of personalty conveying the title of the property to the mortgagee with terms of defeasance.
Constructive contract	A contract which has not the character assigned to it in its own essential nature, but acquires such character in consequence of the way in which it is regarded by a rule or policy of law; hence, inferred, implied, made out by legal interpretation.
Decree reversed	The reversing of the judgment of the lower court.
Defendant	The person defending or denying; the party against whom relief or recovery is sought in an action or suit.
Defendant in error	The distinctive term appropriate to the party against whom a writ of error is sued out.
Demurrer	An objection made by one party to his opponent's pleading, alleging that he ought not answer it, for some defect in law in the pleading. It admits properly pleaded facts.
Demurrer and Joinder	Demurrer as above. Joinder means the joining or coupling together; uniting two or more constituents or elements in one; uniting with another person in some legal step or proceeding. In this connection joining of issue.
Error	A mistaken judgment or incorrect belief as to the existence or effect of matters of fact, or a false or mistaken conception or application of the law (*e. g.*, error on the part of the court in admitting certain evidence.)
Exceptions Overruled	Exception by an attorney is a formal objection to the action of the court during trial. Overruled on argument—court refuses to overturn its action.
Express contract	When the agreement of the parties is definite and formal, and is stated either verbally or in writing.

Feme Covert	A married woman. Generally used in reference to the legal disabilities of a married woman as compared with the condition of a feme sole.
Fi. Fa.	A writ directing the sheriff to seize the goods of a judgment debtor, and sell the same for the purpose of satisfying the judgment.
Foro conscientiae	The conscience.
A fortiori	By a strong reason. A term used in logic to denote an argument to the effect that because one ascertained fact exists therefore another which is included in it, or analogous to it, and which is less improbable, unusual or surprising, must also exist.
Functus officio	Having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force or authority.
Implied contract	When the terms have to be gathered by inference and deduction from facts or conduct.
Indebitatus assumpsit	Action on contract. Brought for the most part on an implied promise.
Ad. Infinitum	That which is endless.
In loco parentis	In the place of a parent. Instead of a parent; charged fictitiously with a parent's rights, duties and responsibilities.
Judgment	The decision given by a court as the result of proceedings instituted therein for the redress of an injury. The jury finds what the redress ought to be; the judgment is the decision or sentence.
Judgment affirmed	Judgment *affirmed* means to have the judgment of a lower court approved by a higher court.
Judgment on the Verdict	The *verdict* is the finding of the jury as to matters of fact.
Judgment reversed	The decision of the lower court was disapproved or disallowed by the higher court to which the case was appealed.

Liability	The state of being bound or obliged in law to pay, or make good something: Legal responsibility.
Locus Sigilli	The place of the seal: the place occupied by the seal on written instruments. Usually abbreviated to "L. S."
Mesne	Intermediate, intervening, the middle between two extremes, especially of rank or time. An intermediate lord; a lord who stood between a tenant and the chief lord. Intermediate transfers.
Motion for new trial	A written application for an order addressed to the court to permit a new trial to be had.
New Trial Awarded	An order directing the re-examination of an issue of fact in the same court after a trial and decision by a jury or court or by referees.
Nisi Prius	The nisi prius courts are such as are held for the trial of issues of fact before a jury and one presiding judge. Used to denote the forum in which the cause was tried before a jury as distinguished from the appellate court.
Nominal	Titular: existing in name only; not real or substantial; connected with the transaction or proceeding in name only, not in interest.
Non assumpsit	A plea to the general issue in the action of assumpsit. A plea by which the defendant avers that "he did not undertake or promise as alleged."
Non compos mentis	Not sound of mind; insane; embraces all varieties of mental derangement.
Non-suit	Order by the court dismissing a case after the plaintiff's evidence is in, that evidence being insufficient to warrant a verdict for plaintiff, regardless of what testimony might be produced by the defendant.
Non sui juris	Not his own master.

Nudum Pactum — A naked act; a bare agreement; a promise or undertaking made without any consideration for it.

Obiter dictum — Obiter means by the way; in passing; incidentally, collaterally. Dictum means a statement, remark or observation. An assertion of a principle by the court not pertinent to the issue involved.

Pari delicto melior est conditio defendentis — In a case of equal or mutual fault, between two parties, the condition of the party in possession, or defending is the better one. Where each party is equally in fault, the law favors him who is actually in possession.

Particeps Criminis — A participant in a crime; an accomplice, one who shares or co-operates in a criminal offence, tort, or fraud.

Per Curiam — By the court, used in the reports to distinguish an opinion of the whole court from an opinion written by any one judge. Sometimes it denotes an opinion written by the chief justice or presiding judge.

Per minas — Duress per minas consists in threats of imprisonment or great physical injury or death.

Per my et per tout — By the half and by the whole. The mode in which joint tenants hold the joint estate, the effect of which, technically considered, is that for purposes of tenure and survivorship, each is the holder of the whole, but for purposes of alienation each has only his own share, which is presumed in law to be equal.

Per se — By himself or itself; in itself; taken alone; inherently; in isolation; unconnected with other matters.

Plaintiff — A person who brings an action; the party who complains or sues in a personal action and is so named on the record.

Plaintiff appeals — When the plaintiff is dissatisfied with the decision and asks for a hearing in a higher court.

Plaintiff in error	A party who sues out a writ of error; and this whether in the court below he was plaintiff or defendant.
Pleadings	The statement of the parties in writing in legal and proper manner covering the causes of action and grounds of defence.
Prima facie	Means such as in judgment of law is sufficient to establish the fact.
Prospective	Looking forward; contemplating the future; a law is said to be prospective (as opposed to retrospective) when it is applicable only to cases which shall arise after its enactment.
Pro tanto	For so much; for as much as may be.
Quantum meruit	As much as he deserved. The common count in an action of assumpsit for work and labor, founded on an implied assumpsit, or promise, on the part of the defendant to pay the plaintiff *as much as* he reasonably deserved to have for his labor.
Quid pro quo	What for what; something for something; used in law for the giving of one valuable thing for another; nothing more than the mutual consideration which passes between the parties to a contract and which renders it valid and binding.
Qui tacet consentire videtur	He who is silent is supposed to consent The silence of a party implies his consent.
Replevin	A personal action ex delicto brought to recover possession of goods unlawfully taken or withheld.
Respondent	The party who makes an answer to a bill or other proceeding in chancery.
Retorno habendo	A writ that lies for the distrainer of goods (when on replevin, etc.) against him who has so distrained, to have them returned to him according to law, together with damages and costs.
Scienter	Knowingly—an allegation, setting out the defendant's previous knowledge of the cause which led to injury complained of.

Scire Facias (Sci. Fa.)	The name of a writ founded upon some public record. A method of proceeding upon a mortgage in Pennsylvania. Sci. fa. to revive judgment.
Seisin	Possession with an intent on the part of him who holds it to claim freehold interest.
Simplex commendatio	Mere recommendation of an article.
Stare Decisis	To stand by the decided cases; to uphold precedents; to maintain former adjudications.
Statute of Limitations	A statute prescribing limitations as to the right of action on certain described causes of action; that is, declaring that no suit shall be maintained on such causes of action unless brought within a specified period after the right accrued.
Statu quo	The existing state of things at any given date.
Sub potestate viri	Under, or subject to, the power of another; used of a wife, child, slave, or other person not sui juris.
Sui juris	Of his own right, possession of full social and civil rights; not under any legal disability or the power of another or guardianship.
Supra	Above; upon; previous part of book.
Tort	Wrong; injury; opposite of right, a wrong or wrongful act, for which an action will lie ex delicto, as distinguished from a contract.
Uberrima fides	Abundant good faith, absolute and perfect candor or openness and honesty; the absence of any concealment or deception however slight.
Ubi revera	Where in reality; when in trust, or in point of fact.
Ultra vires	An action of a corporation which is beyond the powers conferred upon it by its charter, or the statutes under which it was instituted.

Unconscionable	A contract which no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept on the other.
Non-negotiable	Means not negotiable, cannot pass in the business world as a negotiable instrument.
Utile per inutile non vitiatur	The useful is not vitiated by the useless; surplusage does not spoil the remaining part if that be good in itself.
Venire facias de novo	A fresh or new venire, which the court grants when there has been some impropriety or irregularity in returning the jury, or where the verdict is so imperfect or ambiguous that no judgment is reversed on error, and a new trial awarded.
Writ of error	A writ issued out of a court of competent jurisdiction directed to the judges of a court of record in which final judgment has been given and commanding them in some cases themselves to examine the record; in others to send it to another court of appellate jurisdiction therein named to be examined in order that some alleged error in the proceedings may be corrected.